Supreme Court, U.S.
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No. 09-452

IN THE
Supreme Court of the United States

Robert S. Fastov,
Petitioner,

v.

Christie's International P.L.C.,
Christie, Manson & Woods Ltd.,
And Christie's Inc.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

Robert S. Fastov
pro se
Supreme Court Bar No. 97620
4428-45th Street, N.W.
Washington, D.C. 20016-2053
Tel. No.: 202-537-1222

QUESTIONS PRESENTED FOR REVIEW

Whether this Court should accept or reject the potentially very harmful consequences to the judiciary arising from the conclusory and erroneous 3 sentence *Per Curiam* Judgment of the Court of Appeals for the District of Columbia of April 20, 2009, affirming the April 25, 2008 Order of William Stafford, Judge U.S. District Court for the Northern District of Florida, sitting by designation. The very harmful consequences of these decisions arise from following circumstances and considerations. Such decisions sanctioned petitioner pursuant to a bad faith finding under the courts' inherent power (or authority) with all of respondents' fees and expenses, $630,043.32—a record high U.S. court award, the previous highest award being $110,122.65 for an award of this nature since 1992. Petitioner was sanctioned, in significant part, for sending a very long and detailed "garden variety lawyer's letter," seeking settlement, but threatening litigation, if settlement was not achieved, to respondents' Lord Poltimore of July 2, 1994. Both of these decisions have been relatively well publicized, as they are reported verbatim or are available verbatim on internet websites, and at least 25 other websites report on this case, some, in very great detail, which, given the huge amount of the sanction, can affect litigation attorneys' strategic decisions. Such letter antedated the service of petitioner's Verified Complaint by almost 3 years, which is prelitigation conduct that, historically, per *Chambers v. Nasco, Inc.*, 501 U.S. 32, 54, fns. 16 and 17, 60, 74 (1991), should not be sanctioned under the courts' inherent power. Such letters are also immunized under the

Noerr-Pennington doctrine, as interpreted by many Circuit Courts. Thus, these decisions not only violate the principles of *Chambers* and the *Noerr-Pennington* doctrine, they may well chill, if not significantly lessen, the utilization of this important tactical device to achieve settlements, a prelitigation "settlement and threat of litigation letter," which contributes significantly to the settlement process by which the litigation burdens on the already overburdened courts are reduced. Thus, these decisions with the record-setting award of $630,043.32 may well deter attorneys from utilizing these prelitigation letters and variants thereon, forcing significant unnecessary litigation. In addition, the record-setting fees award will inspire other attorneys to seek such large fees because an opponent used these prelitigation letters and for other prelitigation conduct. Finally, these decisions may open a Pandora's box that will generate similar inappropriate judicial sanctions for other kinds of prelitigation conduct, which this Court sought to avoid and preclude in *Chambers*.

Whether these decisions eviscerated the American Rule on attorney's fees and ignored the precepts of *Chambers*, that the courts' inherent power is to enable the courts to protect the judicial process and to preserve "the temple of justice';" and did not, per the majority opinion in *Chambers*, sanction prelitigation conduct and, per the forceful dissent of Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Souter, sanctioning of prelitigation conduct was explicitly precluded; and thus, require reversal.

Whether this Court should reverse these decisions

because they ignore and violate the legal principles of this Court's *Noerr-Pennington* doctrine, as interpreted by many Circuit Courts, to confer immunity under the "right to petition" the government under 1st Amendment of the U.S. Constitution by utilizing prelitigation "settlement and threat of litigation letters," and which, contrary to Judge Stafford's finding of bad faith, regard such letters as "a token of sincerity," as manifesting "good faith" and being worthy of 1st Amendment protection as action attendant to the right to petition the judiciary for assistance.

Whether these decisions also violate the 5th Amendment to the U.S. Constitution, because, per 3 decisions of this Court, they deprived petitioner of due process by denying petitioner's two motions requesting hearings on: (1) respondents' motion for attorney's fees; and (2) in connection with Judge Stafford's determination as to the amount of the fees award, if any.

Whether these decisions conflict with the legal principles in 9 decisions of this Court; and thus, require reversal.[1]

Whether these decisions conflict with the legal principles of several decisions of the Circuit Court of

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[1] *Chambers; Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980); *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971); *Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (which established the *Noerr-Pennington* doctrine); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-422 (1978); *Langnes v. Green*, 282_U.S. 531, 541 (1930); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Hutto v. Finney*, 437 U.S. 678, 689 n. 14, (1978).

Appeals for the District of Columbia and other Circuit Courts regarding the award of attorney's fees; and thus, require reversal.

Whether this Court should reverse these decisions because the huge amount of the award, $630,043.32, all of respondents' attorney's fees and expenses, made against a sole 66 year old petitioner pursuant to the courts' inherent power was a gross abuse of judicial discretion, given the following considerations and circumstances. By a factor of approximately six, it is the highest U.S. court award against an individual under inherent power. The $630,043.32, award exceeded by $519,920.67 the next highest award against an individual, like the petitioner, under inherent power since *Chambers* was decided in 1991 to September 30, 2009, of $110,122.65. The aggregate amount awarded against individuals in the relevant 22 cases was $359,678.92, less than 3/5 of the $630,043.32 awarded against this sole petitioner; 13 of the 22 cases awarded $10,439.50 or less; and $65,760.50 was the next highest award.

Whether these decisions were a travesty of justice and blatant abuses of judicial discretion, tantamount to a denial of due process, in that both decisions ignored and failed to address each and every one of a *pro se* petitioner's valid legal arguments in the documents he filed with each of these Courts; and thus, require reversal.

Whether the Circuit Court's use of an extremely superficial, conclusory 3 sentence *Per Curiam* judgment without any judicial guidelines or regulations specifying under what circumstances such a judgment can be used and without any explanation as to why the Court opted to use such a

judgment, especially, in conjunction with the Court's denying petitioner a hearing, is an abuse of judicial discretion; and thus, requires reversal.

Whether these decisions should be reversed, because respondents' motion for attorney's fees was untimely by 52 days, given the 14-day post judgment filing deadline under Rule 54, F. R. Civ. P. (B). insofar as they relied on the courts' inherent power.

Do these decisions require reversal, because the record high level fees award resulted from both Courts failing to consider: the absence of a need to deter petitioner; petitioner's financial condition, by itself, and relative to that of the very wealthy respondents; and 4 other equitable factors, that they were obligated to consider, but did not. They also relied on major grossly erroneous findings, totally impeached by unrebutted, record evidence.

Whether these decisions should be reversed, because Judge Stafford was significantly biased and prejudiced by respondents' totally irrelevant, erroneous, highly inflammatory, bias and prejudice-inducing initial filings of February 14, 2006, in which, *inter alia,* they brought to Judge Stafford's attention that petitioner might have engaged in "assault, battery, sexual perversion, pedophilia and pederasty," and sought successfully to induce a bias and prejudice, that infected all of Judge Stafford's Orders in this case, all of which were adverse to petitioner.

Whether this Court should reverse these decisions, because of all of the considerations set forth in the preceding Questions Presented, considered in the aggregate and cumulatively, to send a message to the lower courts that they cannot

act in this fashion and significantly harm individuals, including a *pro se* litigant, such as petitioner.

PARTIES TO THE PROCEEDING

Pro se petitioner/plaintiff, Robert S. Fastov ("Fastov"), an individual, and respondents/defendants, Christie's International PLC, Christie Manson & Woods Ltd. and Christie's Inc. ("Christie's"), affiliated corporations. Pursuant to Supreme Court Rule 29.6, petitioner is an individual; thus, there are no parent companies or subsidiaries.

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OPINIONS BELOW

The Court of Appeals' Judgment was entered April 20, 2009, and Petitioner's petitions for rehearing from the 3 Judge Panel and en banc were denied July 16, 2009.

JURISDICTIONAL STATEMENT

This Court has jurisdiction per 28 U.S.C. § 1254 (i) per the above Court of Appeals actions.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The 1st and 5th Amendments to the Constitution; 28 U.S.C. § 1927; 28 U.S.C. § 2107; Rule 4, F. R. App.P; Rule 54, F. R. Civ. P. (B) and (E); Rule 7 (e), LCvR of the U.S. District Court for the District of Columbia (App.312-314).

STATEMENT OF THE CASE

On March 21, 1997, petitioner filed this action seeking damages against respondents, arising from petitioner's consigning his most valuable painting by Emil Jakob Schindler, Austria's best 19th Century Barbizon landscape painter, to respondents in early 1993. Respondents engaged in fraud, deceptive business practices, negligent misrepresentation, infliction of emotional distress and breaches of respondents' duties as petitioner's fiduciary and agent, of contract and of respondents' implied duty of good faith and fair dealing. Respondents destroyed the marketability and value of his painting, which was worth at the least $150,000, as it was one of Schindler's best paintings. Respondents labeled petitioner's painting "not authentic," and, additionally, "a fake," which launched petitioner on

extensive efforts to resurrect the authenticity and market value of the painting and cause respondents to sell his painting. As they did not want to discuss settlement with petitioner over the phone, respondents imposed on petitioner 3 mandates that petitioner produce very lengthy and detailed, but totally unnecessary written communications, which respondents knew would harm and damage petitioner for several reasons, and he was so harmed and damaged, both economically and on health grounds.

This is a very significant case, which provides this Court with an opportunity to revisit *Chambers* and other decisions of this Court and conflicting Circuit Court opinions to reverse the D.C. Circuit's ("the Court") *Per Curiam* Judgment ("Judgment"; App.1-2), affirming Judge Stafford's Order of April 25, 2008 ("4/25 Order"; App.77-85), which manifested major errors of law, erroneous findings of fact, egregious abuses of discretion and bias. These decisions raise a real possibility of very significant and harmful consequences for the judiciary. A key to this case is the huge, record-setting sanctions, $630,043.32, all of respondents' fees and expenses, imposed by the 4/25 Order upon petitioner for "bad faith/motives" under the courts' inherent power for, in significant part, his prelitigation letter, a "garden variety lawyer's letter," albeit lengthy and detailed, seeking settlement, but threatening litigation, if settlement was not achieved, to respondents' Lord Poltimore of July 2, 1994. Such letter antedated service of petitioner's complaint by 3 years; thus, is prelitigation conduct, historically protected under *Chambers* and the *Noerr-Pennington* doctrine. There

are, in essence, these areas of potentially harmful consequences to the judiciary arising from these two well-publicized decisions: (1) The huge award for conduct, hitherto protected by the above legal precedent, will inspire a great number of "new theory" large fees claims based on such prelitigation letters and other prelitigation conduct, which will, in turn, generate additional fees claims based on other prelitigation conduct. (2) Because of the fear of sanctions, attorneys will refrain from using such prelitigation letters or variants thereon, which may cause the number of settlements to drop significantly, and the already overburdened courts will be forced to process a huge number of unnecessary lawsuits, that otherwise would have been settled.

Essentially, the Reasons For Granting The Petition will address all the other Questions Presented in as much detail, as possible, given the 9,000 word limit. The District Court had jurisdiction under 28 U.S.C. § 1331, and the Court had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

I. The Potentially Very Harmful Consequences To The Judiciary Arising Fro These Decisions

Petitioner's Poltimore letter of July 2, 1994, sent 3 years before service of his Verified Complaint on June 25, 1997, in significant part, was the predicate for Judge Stafford's finding the requisite bad faith/motives to grant respondents' motion for attorney's fees under the courts' inherent power in his March 14, 2007 Order ("3/14 Order"; App.56-61) and in his 4/25 Order, awarding respondents all

their fees and expenses, $630,043.32 (App.77-85), a record high U.S. fee award of this nature, *see* § V, *infra*; App.100-107. Such letter was a very lengthy, more detailed version of the "garden variety lawyer's letter," seeking settlement, but threatening litigation, if settlement was not achieved, many of which are sent each day. The Judgment and, especially, the 4/25 Order have been well publicized, either reprinted verbatim or available on the internet and are reported extensively on the internet, sometimes in great detail.[1] The 4/25 Order is accessible on all legal research services. Attorneys will be legitimately concerned about being sanctioned for such prelitigation letters, which have hitherto been protected by *Chambers* (§ II. A. *infra)* and immunized by the *Noerr Pennington* doctrine decisions (§ II. B. *infra).* This may well result in a flood of unnecessary litigation, further burdening the overburdened courts, because of cautious attorneys eschewing such prelitigation letters to achieve settlements, for which they could be sanctioned with huge fee awards.

Obviously, the huge, record amount of attorney's fees awarding $630,043.32, all of respondents' fees and expenses, will attract the attention of litigators seeking large fees awards to websites, such as the "ABA journal" site, entitled: "'Greedy' Stanford Law Grad to Pay $630K in Legal Fees Over...", or similar titles on many websites. They shall pursue huge fees

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[1] A search of websites utilizing "Fastov Christie's April" search phrase yields a significant number of websites, *e.g.*, "Legal Times," "dc.findacase;" "dcd.uscourts.gov," "lexisone. com" and "Entertainment, Arts and Sports Law Journal Fall/Winter 2007."

claims predicated on such prelitigation letters and, quite likely, on other prelitigation conduct. This will open a Pandora's box that may lead to similar inappropriate sanctions for other prelitigation conduct, which this Court clearly sought to avoid and preclude in *Chambers*, 501 U.S. 54, fns. 16 and 17, 60, 74.(1991). The policy quotation from *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) *§ II. B., infra,* requires reversal of these decisions.

II. Petitioner's Arguments To The Court, Virtually All Of Which Were Asserted Before Judge Stafford, Which Both Judge Stafford and the Court Totally Ignored And Did Not Address

Introduction

The Judgment and the 4/25 Order ignored and failed to apply virtually all legal principles, discussed herein, and failed to address any of petitioner's factual assertions and arguments made before each of these Courts. The "findings" in the 4/25 Order, ratified by the Court, regarding petitioner's bad faith, motives and intent to vex and harass, dishonesty and lack of integrity (collectively "bad faith/motives") were based entirely on Judge Stafford's erroneous, speculative inferences and manifest factual and legal errors, made without any credible evidentiary support, let alone "clear and convincing evidence," that also ignored petitioner's incontrovertible, unrebutted documentary and other credible evidence, which unequivocally contradicted such "findings."

A. Judge Stafford's Sanctioning Petitioner For The Poltimore Letter, Which Was Prelitigation Conduct,

Is Not Permissible Under The Courts' Inherent Power, Per *Chambers*.

The quotes from petitioner's Poltimore letter first appeared in Judge Stafford's Corrected Order of March 1, 2006 (App.31-33), granting respondents' summary judgment motion were totally irrelevant to the pending summary judgment issues. Such quotations were repeated verbatim in the 3/14 Order (App.57-58) and 4/25 Order (App.77-78) in support of Judge Stafford's identical bad faith/motives findings" in both such Orders (3/14 Order; (App.59-60);4/25 Order; App.81), based on his findings in the Corrected Order (App.47), which were wholly predicated on Judge Stafford's erroneous, speculative inferences regarding petitioner's motives/intent, contradicted by unrebutted, incontrovertible evidence. At App.81, he stated:

> Plaintiff's "unsupported, unmeritorious claims ... were initiated in bad faith with the intent to subject [Defendants] to 'the worst and most costly' litigation in [Defendants'] experience." Doc. 115 at 24. .... Here, the record amply demonstrates that Plaintiff first initiated, then prosecuted this lawsuit in bad faith for the purpose of harassing Defendants.

Regarding sanctioning prelitigation conduct under inherent power, the majority in *Chambers* stated regarding the District Court ruling it was affirming: "Here the District Court did not attempt to sanction petitioner for breach of contract" and also made clear that that other prelitigation conduct, Chambers filing papers with the FCC, done "in absolute bad faith," was not being sanctioned. Rather, only

Chambers conduct affecting "proceedings in the trial Court" were being sanctioned. The majority also stated that it expressed "no opinion as to whether the District Court would have had the inherent power to sanction Chambers for conduct relating to the underlying breach of contract." *Chambers,* 501 U.S. 354 and fns. 16 and 17. Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Souter, unequivocally stated in his clarifying dissent that prelitigation conduct cannot be sanctioned under inherent power:

> Despite the Court's equivocation on the subject, *ante*, at 54, n. 16, it is impermissible to allow a District Court acting pursuant to its inherent power to sanction such prelitigation primary conduct. A Court's inherent power extends only to remedy abuses of the judicial process....The American Rule recognizes these principles. It bars a federal court from shifting fees as a matter of substantive policy, but its bad faith exception permits fee-shifting as a sanction to the extent necessary to protect the judicial process. The Rule protects each person's right to go to federal court to define and to vindicate substantive rights. "[S]ince litigation is, at best, uncertain, one should not be penalized for merely defending or prosecuting a lawsuit."....When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule, and violates the Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it (bold

face added; citation omitted)." *Chambers,* 501 U.S.74.

It is an error of law to sanction petitioner under the courts' inherent power for this prelitigation conduct. *See Revson v. Cinque & Cinque, P.C.,* 221 F.3d 71, 75, 78-80 (2nd Cir. 2000) re the "proctology letter." Neither Judge Stafford, nor respondents cited a case holding that prelitigation letters warrant attorney's fees awards, except the questionable *Fastov v. Palisades* Opinion, § IV. G., *infra,* in which Judge Williams subsequently dismissed the motion for attorney's fees.

B. Petitioner Is Immune From Liability Arising From The Prelitigation Poltimore Letter, Per This Court's *Noerr-Pennington* Doctrine And The 1st Amendment To The U.S. Constitution.

Prelitigation letters, like the Poltimore letter, seeking settlement and threatening litigation, if settlement is not achieved, are, in fact, evidence of "good faith," not bad faith, as Judge Stafford concluded, and are "a token of sincerity;" that is immune from liability under the First Amendment's right to petition the government for redress, which includes the judiciary, under this Court's *Noerr-Pennington* doctrine,[2] as "acts reasonably and normally attendant upon effective litigation." *Coastal, supra,* 694 F.2d 1367, a leading case on the *Noerr-Pennington* doctrine, specifically approved petitioner's letter:

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[2] *Eastern R.R.Presidents Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington,* 381 U.S. 657 (1965).

> Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it [litigation] will be commenced and a possible effort to compromise the dispute. This is the position taken by most of the courts that have considered the question. [fn30]

Many Circuit Courts have provided immunity from liability for such letters under the *Coastal* precedent,[3] and this doctrine has also been extended from the *Noerr-Pennington* anti-trust context to a wide variety of torts, other business conduct and state claims,[4] similar to the claims made by petitioner in this litigation.

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[3] *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 930-932, 934-935, 936-938; 942 (9th Cir. 2006); *Globetrotter Software v. Elan Computer Group*, 362 F.3d 1367, 1375-1376 (Fed. Cir. 2004); *A.D. Bedell Whol. Co. v. Phillip Morris Inc.*, 263 F.3d 239, 254 (3rd Cir. 2001); *Primetime 24 Joint Venture v. Natl. Bc Co.*, 219 F.3d 92, 100 (2nd Cir. 2000); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1559-1560-1562 (11th Cir. 1992); and *In Re IBP Confidential Bus. Documents Lit.*, 755 F.2d 1300, 1310 (8th Cir. 1985); *see also ANDRX Pharmaceuticals v. Biovail Corp. Intern*, 256 F.3d 799, 818 (D.C. Cir. 2001) citing *Coastal* with approval.

[4] *See Scott v. Hern*, 216 F.3d 897, 914 (10th Cir. 2000) citing cases listing common law torts, to which *Noerr-Pennington* applied; *IGEN Int'l, Inc. v. Roche Diagnostics GMBH*, 335 F.3d 303, 310-313 (4th Cir. 2003) (*Noerr-Pennington* extended to all business torts); *Globetrotter Software supra*, 362 F.3d 1376 (citing cases extending *Noerr-Pennington* to state-law claims).

C. Judge Stafford's Erroneous, Speculative Inferences Regarding Petitioner's Bad Motives And Intent In Writing The Poltimore Letter Were Rebutted By Clear And Convincing Evidence.

The 79-page Poltimore letter sought settlement, which was petitioner's overriding and dominant pacific purpose. Judge Stafford ignored the following text from his quotes from the Poltimore letter, which is totally consistent with petitioner's actual intent and inconsistent with and impeaches Judge Stafford's biased, prejudiced and erroneous inferences of bad faith/motives or to file litigation "with the bad faith intent to subject the defendants to "the worst and most costly" litigation in the defendants' experience. (App.84)."

> The settlement proposals and the purposes of this letter are inherently pacific in nature....[and, if respondents do not settle] I will take any and all actions, both within and without the courtroom, that do not violate the legal rules of professional conduct, necessary to achieve Christie's unconditional surrender (Emphasis added; App.32-33; 58, 79).

In extensive Attachments to the letter, these thoughts wew echoed and petitioner justified and presented a strong case for settlement, by including factual/legal analysis showing that he would win the litigation, "Fastov v. Christie's," Attachment C, and a cost-benefit analysis, "Two Settlement Proposals," Attachment D, based on petitioner's litigation experience regarding litigation costs. He sought to convince respondents, that the substantial litigation costs that he projected/estimated respondents would

incur were not worth forcing litigation, and that, even if miraculously respondents prevailed, they would only obtain a Pyrrhic victory, the results of which would be worth nothing. The high litigation costs passages quoted by Judge Stafford from the Poltimore letter (App.78-79) were not a threat or an indication of petitioner's intent through unethical behavior to run up respondents' litigation costs, as Judge Stafford erroneously inferred, but were taken from petitioner's meticulous cost-benefit analysis. He included "a draft of a settlement agreement," Attachment E, which could generate for respondents a profit, if they marketed petitioner's painting properly.

D. Judge Stafford's Denial Of Petitioner's Two Motions For Hearings Regarding Respondents' Entitlement To Attorney's Fees And The Amount Thereof, If Any, Deprived Petitioner Of Due Process Under The U.S. Constitution's 5th Amendment; Thus, Violating Standards Set Forth In 3 Supreme Court Decisions

Regarding the courts' inherent power, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980) held: "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Chambers,* 501 U.S. 50 held: "A court ....must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees (Bold face added.)." S]anctions require an opportunity for a hearing on the record," especially when a "deprivation of a significant property interest" is involved. *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 522-523 (9th Cir.

1983), citing *Boddie v. Connecticut,* 401 U.S. 371, 378-379 (1971). Per *Boddie, a* hearing must be given "before he is deprived of any significant property interest (Bold face added)." Petitioner advised Judge Stafford of these principles. On May 23, 2006, he denied petitioner's motion for a hearing and for leave to file a surreply regarding the fees motion (App.50-51), granted in 3/14 Order. In his 4/25 Order, he awarded $630,043.32 and denied petitioner's motion for a hearing regarding the fees determination (App.85). The May 23, 2006 and 4/25 Orders denied petitioner due process by depriving him of a significant property interest," $630,043.32 –a record U.S. court inherent power award against an individual. Petitioner was deprived of approximately 2/5 of his financial assets, his sole source of annual income.

Judge Stafford was assigned to a cold case file, when he assumed jurisdiction over this case on February 24, 2005, approximately eight years after the complaint was filed, and the parties had filed all documents regarding respondents' summary judgment motion, and both parties had pending motions for a hearing. Judge Stafford held no such hearing. Indeed, he never held any hearing of any kind and never had an opportunity to observe and assess petitioner's credibility, motives, intent, honesty, character and integrity or that of respondents or their counsel. This is significant in that from Judge Stafford's very first Order of February 22, 2006, as corrected, March 1, 2006 (App.21-48), granting respondents' summary judgment motion, he manifested a bias and prejudice against petitioner, per his very adverse view of

petitioner's motives, intent, honesty and integrity, , which was otherwise inexplicable, but for respondents' counsels' unethical February 14, 2006 filings. *See* IV. G., *infra* . . Holding such hearings would have assisted Judge Stafford in understanding petitioner's evidence, arriving at the truth and making correct findings. In addition, the 4/25 Order, ruled: "5. No motion or petition for rehearing will be entertained" (App.85).

E. Both The Judgment And The 4/25 Order Ignored Petitioner's Arguments That Judge Stafford's Findings That Petitioner's Claims Were "Frivolous," "Baseless," Etc. Were Based On Legal Quicksand, Judge Stafford's Grossly Erroneous Corrected Order Of March 1, 2006 Granting Respondents' Summary Judgment Motion.

The Court ignored petitioner's arguments attacking Judge Stafford's vitriolic, hyperbolic findings that that petitioner's claims were "frivolous" "baseless," "defied all credulity," "unsupported, unmeritorious claims", "were initiated in bad faith," and "malicious," and were such that "anyone with a modicum of common sense would have soon realized was without merit(App.81-85)." Petitioner's arguments were predicated on arguments filed before Judge Stafford attacking his Corrected Order of March 1, 2006 granting respondents' summary judgment (App.21-48), which were the only support for such erroneous, vitriolic, hyperbolic findings. These findings were also a key predicate for Judge Stafford's sanctioning petitioner for $630,043.32. Both Judge Stafford and the Court ignored the devastating attack on the Corrected Order in petitioner's "RSF Supp.," filed with the Magistrate

and Judge Stafford, which was contained in the Appellate Appendix and appears at (App.111-203). Such RSF Supp. justifies instant reversal of such Order.

RSF Supp. dispositively attacks the entire Corrected Order, including its trampling of Black Letter Law principles of summary judgment (App.120-122); summary judgment fact findings (App.131-156); damages analysis (App.188-195); the DC Consumer Protection Procedures Act (App.181-188); emotional distress (App.196-201) and statute of limitations analyses (App.156-180). Petitioner made clear that the Corrected Order ignored and trampled on basic Black Letter Law principles of summary judgment, *e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Judge Stafford ignored material disputed facts; relied on respondents' facts, not petitioner's; and speculatively inferred petitioner's bad faith/motives, which are all barred by clear precedent (App.120-122). Virtually every material fact was disputed and petitioner had documentary support for his facts; and respondents had virtually none. Respondents' witnesses impeached each other on key material facts and supported petitioner's version of certain key material facts, all of which Judge Stafford ignored (App.131-156). Because respondents' counsels knew of the foregoing prior to filing such motion, their such filing was inappropriate and unethical.

The "frivolous, etc." characterizations of petitioner's claims were almost totally undercut by Judge Friedman's February 27, 1998 Order denying respondents' motion to dismiss petitioner's amended complaint (App.9-11). The evidence upon which such

complaint and the more extensive Verified Complaint was predicated was never effectively rebutted or impeached by respondents' discovery, while petitioner's case was materially enhanced by his unearthing documents, which utterly destroyed the credibility of respondents' perjurious, fabricated linch pin of respondents' defense. *See* RSF Supp., App.133-138. Thus, Judge Friedman's Order is significant. *See* RSF Supp (App.181-188), in which he discussed Judge Stafford's erroneous interpretation of petitioner's D.C. Consumer Protection Procedure Act (D.C. Code § 38-3901 et seq.) and Judge Friedman's clearly correct interpretation, supported by contemporaneous and subsequent clear D.C. precedent (App.11).

F. The 3 Documents Criticized In The 4/25 Order Do Not Warrant Sanctions Or A Fees Award.

In the Corrected Order and the 3/14 and 4/25 Orders, Judge Stafford cited and quoted identical passages from Judge Friedman's Orders of June 27, 2000 and August 29, 2000 (App.34-35; 58-59; 79-80), but did not identify Judge Friedman as the author, allowing the reader to infer that Judge Stafford had entered such Orders. The quotations from these two Orders were totally irrelevant to the summary judgment issues addressed by the Corrected Order. Judge Friedman criticized petitioner for filing documents that he deemed too lengthy and threatened petitioner with sanctions, which Judge Friedman never imposed. Petitioner's opposition to respondents' motion for summary judgment (59 pages, which was prepared and filed by petitioner's counsel) violated the 45 page limit of LCvR Rule 7 (e), as did respondents' memorandum supporting

their motion (53 pages). Petitioner's memorandum was struck and criticized; respondents' was not. The other document, prepared and filed by petitioner (approved by petitioner's counsel), complied with such Rule, as did petitioner's objections to the Magistrate's Report that petitioner filed before Judge Stafford, inappropriately criticized for being too lengthy in the 4/25 Order. See App.79-80, 82. Thus, only 3 of petitioner's 49 filed documents were criticized. (Respondents filed 48 documents.) *See* Excerpt 2, petitioner's appellate brief (App.230-236), a condensed version of an extended discussion, at ¶¶ 58-76 of petitioner's December 18, 2007 declaration[5] for a brief discussion of why such documents were not filed with bad faith/motives or to abuse the judicial process. Such discussions make clear that the documents' lengths were attributable to the number and complexity of the issues facing petitioner and were justifiable. Such documents do not warrant, by themselves, or when combined with Judge Stafford's other erroneous bad faith/motive findings, any fee award, let alone $630,043.32. Other judges have praised petitioner's detailed, dense and lengthy filings, for which he was criticized in this case. *See* Text of fn. 79, App.235, for judicial praise in footnote 3 of *City of Grand Rapids v. Richardson*, 429 F. Supp. 1091 (W. D. Mich. 1977).

G. Both Courts Ignored Ample, Unrebutted, Incontrovertible Evidence That Petitioner Did Not Have The Bad Faith/Motives, Erroneously Divined By Judge Stafford. Rather, Petitioner Clearly Acted

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[5] Such ¶¶ will be included with petitioner's brief, if the petition is granted.

In Good Faith And Had Very Valid Reasons For Suing Respondents.

Both Courts ignored petitioner's arguments and documentary evidence pertaining to his May 13, 1997 letters to, *inter alia,* the 3 Chairmen of the respondents, with 4 extremely lengthy, detailed analytic Enclosures. Respondents mandated that petitioner write such letters on August 18, 1994, as respondents refused to engage in settlement negotiations over the phone with petitioner, knowing that petitioner planned to do some very extensive and burdensome factual and legal research and writing. From August 18, 1994 to the May 13, 1997, petitioner worked very hard on what became the May 13, 1997 letters without any contact with respondents whatsoever; hence, he cannot be accused of bad faith/motives or conduct during this period. Unless he was certifiably insane, which, he was not, petitioner would not have spent a total of 4,169.25 hours and in excess of $16,022.04 to run up respondents' future litigation costs.

Such letters and Enclosures make clear that petitioner did not intend to file suit to run up respondents' litigation costs or with bad faith/motives. They show, that he wanted to avoid litigation and settle with respondents, and that petitioner made an extraordinary effort to cause settlement and to determine and make sure that he could demonstrate to respondents, not only did he have valid legal claims, but that he would prevail in the litigation, if respondents opted not to settle. They also destroy Judge Stafford's findings that petitioner's claims were "frivolous," etc..

The Enclosures were: (1) the "Quasi-Memorandum Of Points And Authorities: An Overview And Analysis Of The Principles Of US Law That Will Be Applicable To "Fastov v. Christie's." 421 pages thereof were a legal analysis of all of respondents' potential defenses and why respondents would not prevail on a motion to dismiss or for summary judgment, and that petitioner would prevail on the merits, based on petitioner's very extensive factual . and legal research. *See* Table of Contents thereof, also listing 481 pages of potential jury instructions (App.305-311); (2) a detailed analysis of the documentary record and testimony applicable to the case (234 pages); (3) an analysis of why his Schindler painting' was authentic and detailed research pertaining to the "Norms And Customary Practices" of respondents "And Other Major Auction Houses And Their Impact On" respondents' fabricated misrepresentations (220 pages); and (4) petitioner's "Quasi-Affidavit, petitioner's 225 page Verified Complaint, which had not been served. Such Complaint was based on documentary evidence and petitioner's contemporaneously created hand-written notes of each of his conversations with respondents, except for one, which was tape recorded.

Petitioner asserted that respondents should not expend, what, in all likelihood, would be many thousands of dollars in forcing litigation and mounting what would have to be a fabricated and perjurious, stalling defense in the hope of achieving a useless, Pyrrhic victory, which would be a worthless judgment, stating, in effect: "Christie's beats Fastov."

Petitioner had very valid reasons for serving such Complaint, after respondents totally ignored his May 13, 1997 letters seeking settlement. By the March 21, 1997 filing date of such Complaint, petitioner expended a total of 4,169.25 hours and in excess of $16,022.04 in attempting to resurrect unsuccessfully the marketability and value of what had been his most valuable art work, and responding to 3 different mandates that respondents had imposed on petitioner to research and generate lengthy documents, because they declined to discuss settlement with petitioner over the phone. Respondents knew that such mandates would waste petitioner's time, energy and money and could cause petitioner economic and health problems and damages, which is precisely what happened. These damages were in addition to the approximately $150,000+ loss caused by respondents rendering his painting unmarketable as an authentic Schindler. Other than his erroneous conclusion that the painting's value had not been damaged, Judge Stafford ignored the other economic and health damages in his damages analysis, as well as in his emotional distress analysis in the Corrected Order. *See* App.44-48; RSF Supp., App.188-195.

H. Respondents' Attorney's Fees Motion Was Untimely, per Rule 54, F. R. Civ. P. (B), And Should Have Been Dismissed.

Respondents' attorney's fees motion, filed on April 6, 2006, was filed 43 days after Judge Stafford's Order and Judgment of February 22, 2006. Rule 54 (d) (2) (B), F. R. Civ. P. requires that an attorney's fees motion be filed no later than 14 days after entry of judgment. Thus, such motion was untimely and

barred, insofar as it was predicated on the courts' inherent power, as it was not exempted from the 14 day requirement per Rule 54 (d) (2) (E). *See Presutti v. Presutti,* Case No. 2:02-cv-340; Loislaw, 3-4 (S.D.Ohio May 8, 2006) where the winning party sought fees, predicated on inherent power. The court held that "because Defendants' motion was not filed within 14 days of the judgment in this case, it is untimely under Rule 54(d)(2)(B)." In his Report and Recommendation, the Magistrate predicated his award solely on inherent power; rejected 28 U.S.C. § 1927, and recommended an award of $110,000 (App 47-69; 75). The 4/25 Order ruled:

> The magistrate judge's report and recommendation (doc. 148) is ADOPTED—except insofar as to the amount to be awarded to the defendants—and is incorporated by reference into this order (App.85).

III. The Court's *Per Curiam* Judgment Requires Reversal On Numerous Grounds.

See App.1-2 for the text of such erroneous conclusory, superficial 3 sentence Judgment. The Court totally ignored the legal principles governing general appellate review and review of the granting of fees motions and subsequent monetary award, as well as all of petitioner's arguments in his appellate brief. *See* Table of Contents thereof (App.108-110) and reply brief. Virtually all of these arguments were made before Judge Stafford, but were not addressed in the 4/25 Order. *See, e .g., FDIC. v. Deglau,* 207 F.3d 153, 175 (3rd Cir. 2000): "The

district court's failure to examine a potentially winning argument was an abuse of discretion."[6]

In petitioner's reply brief, petitioner demonstrated that virtually every argument in respondents' brief, addressing petitioner's such brief arguments, were not raised by respondents before Judge Stafford; and thus, were waived by respondents, and the Court was precluded from considering respondents' arguments, but, obviously, did so.[7]

Kickapoo Tribe in Kan. v. Babbitt, 43_F.3d_1491, 1497 (D.C. Cir. 1995), made manifest the Court's general obligations to review with care Judge Stafford's factual findings and application of the law to such findings, which the Court failed to do:

> The exercise of discretion contemplates reasoned decision making on the basis of relevant and appropriate considerations to the task at hand. *See generally Langnes v. Green*, 282 U.S. 531, 541 (1930)....An appellate court, in reviewing for an abuse of discretion, must consider "whether the decision maker failed to consider a relevant factor, whether he [or she] relied on an improper factor, and whether the reasons given reasonably support the conclusion."....The district court "abuses its discretion if it did not apply the correct legal standard....or if it misapprehended the

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[6] *See St. Paul Fire & Marine Ins. Co. v. U.S.*, 6 F.3d 763, 770 (Fed. Cir. 1993) holding that court's failure to consider an alternative argument requires remand for making appropriate determination.

[7] *See, e.g., District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-1085 (D.C. Cir. 1984), the leading D.C. case on waiver, cited by at least 33 D.C. Circuit cases.

> underlying substantive law."....If the exercise of discretion was in error and the prejudicial impact of that error requires reversal...the appellate court will hold that the district court has abused its discretion (Bold face added; citations omitted).[8]

See other appellate review principles directly relating to an award of attorney's fees under the courts' inherent power set forth in *Association, Amer. Phys. & Surg. v. Clinton*, 187 F.3d 655, 660-661 (D.C. Cir. 1999), *infra*, and other cases, which both Judge Stafford and the Court also ignored. The D.C. Circuit has held that if a district court fails to adequately articulate its reasoning regarding an award of attorney's fees, the court's decision will, at a minimum, be reversed.[9]

A finding of bad faith is usually reviewed under the clearly erroneous standard and the imposition of sanctions is reviewed under the abuse of discretion standard, as manifested in the Judgment. However, this case cried out for *de novo* review, as the reasons underlying the Court's according great deference to a

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[8] This opinion was written by Judge Rogers, joined by Judge Ginsburg who, along with Judge Garland, rendered such Judgment. *See also, e.g., Smalls v. U.S.*, 471 F.3d 186, 191(D.C. Cir. 2006). Regarding Judge Garland who also rendered such Judgment, see, e.g., *United States v. Leandre*, 132 F.3d 796, fn. 3 (D.C. Cir. 1998).; *Fogg v. Gonzales*, 492 F.3d 447, 452 (D.C. Cir. 2007); *Peyton v. DiMario*, 287 F.3d 1121, 1126 (D.C. Cir. 2002). Judge Garland joined the opinion in *Andrx Pharmaceuticals v. Biovail Corp. Intern*, 256 F.3d 799, 818 (D.C. Cir. 2001), *infra*, re prelitigation letter is immune from liability..

[9] *See Moore v. Capitalcare, Inc.*, 461 F.3d 1, 14 (D.C. Cir. 2006).

District Court's findings of fact and law are totally absent in this case. Judge Stafford's late entrance in this cold case, and his intentionally refusing to hold any hearings in which he could assess the credibility, motives, intent, etc. of petitioner or respondents' counsels, which led to his predicating his Orders on his negative, erroneous speculative inferences regarding petitioners' bad faith/motives supplied inappropriately, erroneously and, sometimes, unethically, by respondents' counsels justified *de novo* review.

Most importantly, the 4/25 Order, ruled: "5. No motion or petition for rehearing will be entertained (App.85)." Thus, petitioner was forced to raise in the Court for the first time, his arguments directed at the errors in the "new portion" of the 4/25 Order (App.81-85), as the "previous portion" (App.77-81) quoted verbatim the findings of the 3/14 Order (App.56-61). Petitioner's arguments before Judge Stafford regarding "previous portion" errors were not addressed in the 4/25 Order or the Judgment. The Court's Judgment did not make the requisite *de novo* findings under the legal principles, regarding the "new portion" errors in petitioner's arguments II. C. and II. E. 1-2, 5. *See* Table of Contents, petitioner's appellate brief (App.108-110). Moreover, petitioner's appellate brief arguments (Argument II.C.; App.108) predicated on Judge Stafford's refusing to address in his 3/14 and 4/25 Orders ANY of petitioner's "pevious portion" factual assertions and legal arguments , compelled the Court to review the 4/25 Order on a *de novo* basis and to reverse the 4/25 Order.

The Judgment did not satisfy the Court's above-described legal obligations and, along with the 3/14 and 4/25 Orders, ignored the legal principles for determining the existence of the requisite bad faith/motives, etc. to invoke inherent power and the amount of a fees award, if any, made pursuant to such finding, per decisions of this Court, the D.C. Circuit and other Circuits, as follows.

Chambers, the leading Supreme Court case dealing with the courts' inherent power to impose attorney's fees held that it is a narrow exception to the American Rule, requiring parties to bear their own attorney's fees.[10] It should be applied restrictively and not to swallow such Rule.[11] The inherent power to sanction is bottomed on the courts need to protect against abuses of the judicial process[12] and is based on "a court's inherent power to police itself.[13] It is not a "substantive remedy, but is a matter of vindicating judicial authority."[14]

"Because of its very potency inherent powers must be exercised with restraint and discretion."[15] The purpose of the inherent power is to "control the ***litigation before*** . . . [the court]."[16] Such power should not be used to sanction prelitigation conduct.[17]

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[10] 501 U.S. 47, 59.

[11] *United States v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 171 (2d Cir. 1996).

[12] 501 US 45.

[13] *Ibid.* at 47.

[14] *Ibid.* at 34, 55.

[15] *Ibid.* at. 44. *Fernandez v. Leonard*, 963 F.2d 459, 463 (1st Cir. 1992) *Blue v. U.S. Dept. Of Army*, 914 F.2d 525, fn. 3 (4th Cir. 1990).

[16] *Federal Deposit Ins. Corp. v. Maxxam, Inc.*, 529 F.3d 566, 591, (5th Cir. 2008): "It is not a broad reservoir of power, ready

Attorney's fees can only be shifted when there has been: (1) willful disobedience of a court order and (2) litigation conduct in which the party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." or, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled."[18] As previously discussed, both *Chambers* and *Roadway* require hearings. "The 'bad faith' exception to the general rule against award of attorney's fees is a narrow one, however, to be applied only in exceptional circumstances. (Bold face added.)."[19] Few cases have upheld an inherent power sanction as applied to an individual and/or a party associated with such individual. " [20]

Association, Amer. Phys. & Surg, supra, 187 F.3d 660-661 held:

> [T]the question of bad faith in the context of the common law exception to the American rule on counsel fees...is one of fact requiring a clearly erroneous standard of review." ...Nevertheless, the substantive standard for a finding of bad

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at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function.... The purpose of the inherent power is to "control the *litigation before* . . . [the court] (Bold face added)."

[17] 501 U.S. 54, fns. 16 and 17, 74.

[18] *Ibid* at 45-46.

[19] *Eureka Inv. Corp., N.V. v. Chicago Title Ins.*, 743 F.2d 932, 946 and fn. 61 (D.C. Cir. 1984). Per *Shepherd v. American Broad. Cos., Inc.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995): 'Because "inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion...".

[20] *See* App.101-106, for a list showing only 3 Circuit Court decisions in which inherent power fees awards against an individual have been affirmed since *Chambers* and for small awards. Case numbers 18, 20 and 22.

> faith is "stringent" and "attorneys' fees will be awarded only when extraordinary circumstances or dominating reasons of fairness so demand."...Further, the finding of bad faith must be supported by "clear and convincing evidence,"[21]...which "generally requires the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain." ...Because we find insufficient evidence in the record to satisfy the stringent bad faith standard, we hold that the district court's bad faith findings are clearly erroneous (Bold face added; citations omitted).

Because a court finds against a party on the merits does not make the party's case unfounded, meritless, or frivolous for the purpose of awarding attorney's fees. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421-422 (1978). Per *Milltex Industries Corp. v. Jacquard Lace Co.*, 55 F.3d 34, 37 (2nd Cir. 1995):

> [T]he imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation (Bold face added.) .

There must be "a particularized showing of bad faith to justify the use of the court's inherent power." (Bold face added.).[22] The court's factual findings of bad faith must be characterized by "a high degree of

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[21] *See, e.g., Shepherd, supra,* 62 F.3d 1478.

[22] *U. S. v. Int'l Bhd of Teamsters,* 948 F.2d 1338, 1345 (2nd Cir. 1991).

specificity" (bold face added.). *Milltex*, 55 F.3d 38. An award of sanctions under the court's inherent power requires both "clear evidence that the challenged actions are entirely without color, and [are taken] for reasons of harassment or delay or for other improper purposes and a high degree of specificity in the factual findings of [the] lower courts (Bold face added.)."[23] "A claim is colorable 'when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim (Bold face added.).'" *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78-79 (2nd Cir. 2000).

As to the amount of the sanction to be imposed:

> the district court must properly "calibrate the scales" to ensure that the gravity of an inherent power sanction corresponds to the misconduct. The graver the sanction under consideration, the more precision this calibration requires. We also agree with our sister circuits that for purposes of appellate review this calibration must be apparent in the record (Bold face added.)." [24]

The sanction imposed must be proportionate to misconduct[25] and should not be "overly harsh" and "a

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[23] *E.g., Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986) *cert.* denied, 480 U.S. 91 (1987). *First Bank Of Marietta v. Hartford Under.*, 307 F.3d 501, 524 (6th Cir. 2002), adopted and summarized the holding in *Colombrito v. Kelly*, 764 F.2d 122, 133 (2nd Cir. 1985): "Neither meritlessness alone . . . nor improper motives alone . . . will suffice. (Bold face added)."

[24] *Shepherd, supra*, 62 F.3d 1478-1479

[25] *Goya Foods, Inc. v. Wallack Management Co.*, 344 F.3d 16, 20 (1st Cir. 2003). *See Chambers*, 501 U.S. 44-45.

pointless exaction of retribution."[26] The frequency and severity of abuses are relevant to the amount of attorney's fees that may be awarded. (Bold face added.)." [27] "The cornerstone of imposing a monetary sanction, however, should be the selection of an amount no greater than sufficient to deter future misconduct by the party (Bold face added.)."[28] The court should consider the sanctioned party's ability to pay, the relative wealth of the parties and other equitable factors,[29] as it is, in effect, sitting as an equity court in awarding such fees in a bad faith context. *Hutto v. Finney,* 437 U.S. 678, 689 n. 14, (1978). *Fernandez v. Leonard,* 963 F.2d 459, 463 (1st Cir. 1992) and *Blue v. U.S. Dept. Of Army,* 914 F.2d 525, fn. 3 (4th Cir. 1990) made clear that the

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[26] *Bonds v. District of Columbia,* 93 F.3d 801, 808 (D.C. Cir. 1996).

[27] *Chambers,* 501 U.S. 56-57. *Chambers* approved a finding of bad faith and an award of $996,644.65 in attorney's fees against a party who had: (1) attempted to deprive the court of jurisdiction by acts of fraud; (2) filed false and frivolous pleadings; and (3) attempted by other tactics of delay, oppression, harassment, and massive expense to reduce his opponent to "exhausted compliance." *Id.* 41-42, 51, 56-58, 70-73, which is not present here.

[28] *In Re Kujawa,* 270 F.3d 578, 583 (8th Cir. 2001).

[29] *See, e.g., Dehauche v. Trani,* 191 F.3d 499, 511 (4th Cir. 1999) (reversible error not to consider ability to pay); *Baker v. Alderman,* 158 F.3d 516, 528-529, fn. 88 (11th Cir. 1998) "(Fee awards are equitable matters permitting the court "to consider the relative wealth of the parties.");" *Hilton Hotels Corp. v. Banov,* 899 F.2d 40, 46 (D.C. Cir. 1990), discussing Rule 11 sanctions: "A court should strike a case-specific balance between equity, deterrence and compensation." *See Pedlow v. Stamp,* 776 P.2d 382, 384, fn. 3 (Colo. 1989) listing 8 mitigating and equitable factors to be included in a determination as to an award of attorney's fees.

overriding purpose of inherent power and other sanctions powers is to deter future abuse of the judicial process.[30]

All of the foregoing principles were ignored in the Judgment and the 4/25 Order.

IV. The Record-Setting Fees Award Resulted From Both Courts Failing To Consider: The Absence Of A Need To Deter Petitioner; Petitioner's Financial Condition, By Itself, And Relative To That Of The Very Wealthy Respondents; And 4 Other Equitable Factors, That They Were Obligated To Consider, But Did Not. They Relied On Major Grossly Erroneous Findings, Totally Impeached by Unrebutted, Record Evidence. Except As Specifically Indicated, All Pertinent Arguments Were Made First Before Judge Stafford.

A. Deterrence is a primary factor in determining fees award amount, if any, and petitioner did not need to be deterred, given various personal reasons and constraints. Fastov has not earned any income from the practice of law since December, 1985. *See* excerpt from petitioner's memorandum of May 8, 2007 (App. 301-304); ¶¶ 13, 14, 19, petitioner's Declaration (App.210-211; 215).

B. Petitioner's first argued to the Court, that Judge Stafford's had made new erroneous findings in the 4/25 Order that petitioner "shunned every opportunity to mitigate his loss; abused " the judicial process;" "wasted the time and energy of at least 3 federal judicial officers;" and "degraded the entire

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[30] *See, e.g., Stafford v. U.S.*, 208 F.3d 1177, 1179 (10th Cir. 2000); *Mann v. Boatright*, 477 F.3d 1140 (10th Cir. 2007); *In Re Richards*, 213 F.3d 773, 788 (3rd Cir. 2000).

judicial system;" inflicted "senseless bleeding;" and "persisted in inflicting more wounds" in his hyperbolic, vitriolic, tirade in the 4/25 Order's "new portion" (App.81-85). Such findings were contradicted by unrebutted evidence, logic and reason. *See* App.229-230; 245-247; 255-261. Petitioner emphasizes that he made several unsuccessful efforts to settle this matter and initiated nothing, but filed only responses in reaction to the Judge Stafford's Orders, the Magistrate's Report and Recommendation and respondents' filings regarding summary judgment and attorney's fees from June 1, 2000 to April 10, 2008 and labored mightily to settle this matter in March 2006, after the issuance of the Corrected Order to avoid litigating respondents' attorney's fees claims, but was briskly rebuffed, totally undercuts these findings and makes clear that petitioner had no bad faith/motives or wanted to abuse the judicial process.

C. Judge Stafford's made a new erroneous "failure to corroborate" finding regarding petitioner's financial condition, first made in the 4/25 Order (App.80); thus, first raised by petitioner before the Court, which caused Judge Stafford to refuse consider petitioner's financial condition. The Magistrate did so, based on petitioner's Declaration and assessing petitioner's credibility at a hearing, recommending a $110,000 award. Petitioner filed corroborating documents with Judge Stafford regarding his bank and broker statements, credit cards and other relevant documents, to which Judge Stafford was oblivious. *See* App.247-248.

D. Judge Stafford ignored petitioner's argument that he should consider petitioner's financial

condition, by itself, and in relation to respondent's financial condition, which Judge Stafford ignored. Petitioner is the poorest of paupers, compared with respondents' multi-billion dollars per year sales profits and respondents' sole owner, Francois Pinault, who was # 34 on the 2007 *Forbes* list of "World's Billionaires," with a net worth of $14.5 billion in 2007, and, per such 2008 *Forbes* list, Pinault's net worth climbed to $16.9 billion, *See* App.248-250.

E. Petitioner had already paid Mr. Russell, his counsel from 1997-2000, in excess of $200,000 in fees and incurred $48,264.39 in out of pocket expenses in this litigation. The foregoing also controverts Judge Stafford's finding that petitioner was motivated to merely run up respondents' litigation costs. *See* App.250; ¶ 16, petitioner's Declaration, App.212-213.

F. Judge Friedman would not have ruled against petitioner, a consignor, regarding his crime-fraud and other discovery motion seeking discovery re respondents' disgruntled consignors and would not have threatened to sanction petitioner and his counsel, had he known that respondents had entered, maintained and covered-up their 1992-1999 criminal conspiracy with Sotheby's to fix consignor fees in violation of the Sherman Act and to take other damaging actions and the implications of this conspiracy for this litigation. *See* ¶¶ 25-36, petitioner's Declaration, App.219-228; 251.

G. Most importantly, respondents' counsels unethically filed totally irrelevant, untimely, inflammatory, prejudicial, bias-inducing documents on February 14, 2006 with Judge Stafford. They filed their Letter (App.84-87) and Notice (App.88-91),

transmitting the Opinion of Judge Alexander Williams in *Fastov v. Palisades* of January 31, 2006 (App.92-97) (collectively, "February 14 filings"), shortly before Judge Stafford granted respondents' summary judgment motion. Such Opinion apprised Judge Stafford, *inter alia*, that petitioner was in litigation, in which the sole issue was whether petitioner engaged in "assault, battery, sexual perversion, pedophilia and pederasty" (App.97), and Judge Williams had awarded Palisades attorney's fees, in part, because petitioner had written prelitigation letters to Palisades similar to the Poltimore letter. (App. 97-99). *NB.* Judge Williams subsequently dismissed Palisades attorney's fees motion. In a settlement, Palisades waived any claims for approximately $40,000.00 in attorney's fees and admitted that it had not intended to libel petitioner and petitioner had not, in fact, engaged in "assault, battery, sexual perversion, pedophilia and pederasty." Respondents never told the Court about these developments. Thus, respondents' counsels unethically presented Judge Stafford with a choice between accepting the views of the very posh, prestigious, respondents, Christie's, and a flotilla of Wall Street lawyers vs. a *pro se* sex pervert.

The "assault" "sex perversion" information was TOTALLY IRRELEVANT TO THE PENDING SUMMARY JUDGMENT MOTION and was only filed to bias and cause Judge Stafford to grant respondents' summary judgment motion and to lay the foundation in his summary judgment order for granting respondents' attorney's fees.

In such Letter and Notice, respondents' counsels also: (i) made the blatantly disingenuous assertion that petitioner "intended to prosecute his lawsuits in such a way that his adversaries would be put to enormous expense even if his claims had no merit (Bold face added) (App.87);" (ii) set forth Poltimore letter "threat" quotations and erroneously blamed petitioner's complaint for causing respondents "to expend hundreds of thousands of dollars in defense costs" (App.87-88); and (iii) cited and quoted from Judge Friedman's Orders of June 27 and August 29, 2000 criticizing petitioner for unduly lengthy filings and threatening future sanctions (App.88). Such text was repeated virtually verbatim in such Notice (App.90-93).

Judge Stafford succumbed totally to these February 14 filings. He included and expanded respondents' counsels' quotations from the Poltimore letter (App.31-33) and Judge Friedman's two Orders in his Corrected Order granting summary judgment, (App.34-35), even though these passages in his Order were totally irrelevant to the summary judgment decision. Such passages were repeated verbatim in his 3/14 Order (App.57-59) and 4/25 Order (App.78-80).

Petitioner's objections to Judge Stafford's considering the February 14 filings was ignored. The prejudicial effect of such February 14 filings is manifest in every Judge Stafford Order: Corrected Order granting summary judgment; Order denying petitioner's motion for an extension of time to file a notice of appeal of June 8, 2006 regarding the Corrected Order (App.51-55) (depriving petitioner of

de novo review of the Corrected Order[31]); Order of May 23, 2006 denying petitioner a hearing and motion for leave to file a surreply regarding respondents' attorney's fees motion (App.49-50); and the 3/14 Order (App.56-61) and 4/25 Order (App.77-85), in which he also barred petitioner from filing a motion or petition for rehearing (App.85).

Regarding Judge Stafford's May 23, 2006 Order, he labeled petitioner as "disingenuous" and disbelieved, without assessing petitioner's credibility, honesty, and integrity in any hearing, two critical sworn assertions concerning petitioner first learning on April 11, 2006 of the February 22, 2006 Judgment, and petitioner had no "practical" appellate experience," supporting his excusable neglect/good cause argument. *See* App.52-54. He denied petitioner's motion, even though petitioner had otherwise complied with the requirements of 28 U.S.C. § 2107 and Rule 4, F. R. App.P.. Petitioner relied on his reading of Rule 4 (a) (1) (A), F.R.App.P. and 28 U.S.C. §2107 (a), providing a 30 day deadline from the date of an Order or a judgment for filing a notice of appeal, and filed within 30 days of the Corrected Order of March 1, 2006. Most importantly, Judge Stafford misinterpreted this Court's holding in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993), citing to 507 U.S. 392, regarding the meaning of excusable neglect (App.53). In fact, this Court rejected that "excusable neglect" had to have some cause beyond the reasonable control of the attorney. It held that "neglect" included "negligence," and

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[31] *See, e.g., Colbert v. Potter*, 471 F.3d 158, 164 (D.C. Cir. 2006).

courts could "accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control."507 U.S. 388.

The Court affirmed Judge Stafford's Order, without a hearing, with an erroneous, conclusory 1 sentence *Per Curiam* Judgment of April 10, 2007 (App.3-4), an abuse of appellate discretion, which cited two obscure cases, that supported petitioner's position, not the Court's!!! The Court ignored all of petitioner's appellate brief arguments. In petitioner's petition for rehearing, he argued: the Court's errors; he would prevail on the Corrected Order appeal; and respondents were seeking a $630,043.32 fee award, which was ignored. *See* petitioner's petition for rehearing (App.262-300), especially argument III. A., "This Court's judgment is flawed" (App.287-289).

At the December 18, 2007 hearing, the Magistrate indicated that Judge Stafford had apparently decided to relinquish this case to Judge Friedman. Petitioner filed on December 31, 2007 a letter to Judge Friedman, urging him to reassume jurisdiction, criticizing forcefully Judge Stafford. On January 4, 2008, the Magistrate advised the parties, without explanation, that Judge Stafford "has recently informed the Court" that he would retain jurisdiction (App.62). The 4/25 Order awarded respondents $630,043.32, all their fees and expenses, and barred petitioner from filing a petition/motion for rehearing (App.83). Thus, Judge Stafford capped his uninterrupted exercise in bias. *See* App.236-244. The award was "a pointless exaction of retribution" by a biased, arrogant and incompetent judge, who

engaged in vitriolic hyperbole to mask his inept fact finding and legal expertise. *See* App.255-261.

H. Respondents' counsels engaged in other unethical or inappropriate conduct, which allowed them to put their legal fees "gravy train" on track and to keep it rolling through their filing and processing their unethical summary judgment motion to generate huge attorney's fees. *See* App.251-252.

V. The Errors In These Courts' Decisions Generated A Grossly Abusive All Time High U.S. Court Record For A Fee Award Against An Individual Pursuant To Inherent Power.

The $630,043.32 award exceeded by $519,920.67 the next highest award against an individual, like the petitioner, under inherent power since *Chambers* was decided in 1991, of $110,122.65. *See* case #19; App.106. Per App.100-107, the aggregate awards against individuals in the relevant 22 cases was $359,678.92, less than 3/5 of the $630,043.32 awarded against this sole petitioner. 13 of the 22 cases awarded $10,439.50 or less; and $65,760.50 was the next highest award. Another *pro se* plaintiff, whose conduct was far worse than that of petitioner, was sanctioned $2,000.00. *See* case #16; App.106.

CONCLUSION

These decisions significantly damaged petitioner financially and, per the internet, put a public blot on his integrity, honesty, character, competence and intelligence,[32] that no court ever criticized or

[32] Petitioner was graduated from Harvard University, AB, *cum laude* and from Stanford University Law School, where he

challenged, when petitioner was a practicing litigator from 1967-1968, 1972-1985. He had an excellent career and reputation.[33] He is currently facing a DC Bar investigation predicated on Judge Stafford's sanctions.

The petition for the writ of certiorari should be granted.

Respectfully submitted,

Robert S. Fastov
pro se
Supreme Court Bar No. 97620
4428-45th Street, N.W.
Washington, D.C. 20016-2053
Tel. No.: 202-537-1222

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received the Fletcher prize, given to the person who, in the Dean's judgment, had made the most significant contribution to the school in his last year.

[33] Petitioner received the U.S. Department of Commerce Bronze medal. No Department attorney had received a medal in at least the previous 20 years. He served on Federal Bar Association panels regarding Federal grant litigation, and had a major case, that he won, reported on the front page of the *NY Times*. He played a significant role in the Solicitor General's brief in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in which this Court sustained as constitutional a Congressional statute establishing a minority quota, the only time this has occurred.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI FILED BY ROBERT S. FASTOV

I. ORDERS AND JUDGMENTS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7062

September Term 2008
1:97-cv-00578
Filed On: April 20, 2009

Robert S. Fastov,
Appellant

v.

Christie's International PLC, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Ginsburg, Rogers, and Garland, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed April 25, 2008, be affirmed. The district court's finding that appellant had engaged in bad faith litigation is not clearly erroneous. See American Hosp. Ass'n v. Sullivan, 938 F.2d 216, 222 (D.C. Cir. 1991). Additionally, given the findings of appellant's egregious conduct after judicial warning that has caused appellees to spend unnecessary amounts to defend a baseless lawsuit, even after the Magistrate Judge proposed to reduce the amount of fees appellant would have to pay, the district Court acted within its discretion by ordering appellant to pay to appellees $630,043.32 in attorneys' fees and expenses as a sanction for appellant's bad faith conduct. See Chambers v. NASCO, Inc., 501 U.S. 32, 55-57 (1991).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7062

September Term 2008
1:97-cv-00578
Filed On: April 10, 2007

Robert S. Fastov,
Appellant

v.

Christie's International PLC, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Brown, Griffith, and Kavanaugh, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34 (a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed June 8, 2006, is affirmed.

The district court did not abuse its discretion in denying appellant's motion for an extension of time to file a notice of appeal. Cf. Johnson v. Lehman, 679 F.2d 918 (D.C. Cir. 1982) (abuse of discretion regarding grant of Rule 4(a)(5) motion); see Tooling Research, Inc. v. Tri-onics, Inc., 1 F.3d 1231 (D.C. Cir. 1993) (abuse of discretion regarding denial of Rule 4(a)(6) motion).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7062 September Term 2008

1:97-cv-00578
Filed On: April 6, 2009

Robert S. Fastov,
Appellant

v.

Christie's International PLC, et al.,
Appellees

BEFORE: Ginsburg, Rogers, and Garland, Circuit Judges

ORDER

Upon consideration of the motion to dispose of the case without oral argument and the opposition thereto, it is

ORDERED that the motion be granted.

Because oral argument will not assist the court in this case, the court will dispose of the appeal without oral argument on the basis of the record and the presentations in the briefs. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34U).

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7062

September Term 2008
1:97-cv-00578
Filed On: July 16, 2009

Robert S. Fastov,
Appellant

v.

Christie's International PLC, et al.,
Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en bane, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7062 September Term 2008

1:97-cv-00578
Filed On: July 16, 2009

Robert S. Fastov,
Appellant

v.

Christie's International PLC, et al.,
Appellees

BEFORE: Ginsburg, Rogers, and Garland, Circuit Judges

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied

Per Curiam

FOR THE COURT:
Mark J. Langer
BY: /s/
Michael C. McGrail
Deputy Clerk

II. ORDERS, JUDGMENTS AND OPINIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED: FEB 27, 1998
Clerk, U.S. District Court
District of Columbia

Robert S. Fastov,
Plaintiff

v.

Christie's International PLC, et al.,
Defendants

MEMORANDUM OPINION AND ORDER

This case is before the Court on defendants' motion to dismiss the amended complaint that was filed on December 2, 1997. After carefully considering defendants' motion, plaintiff's opposition and defendants' reply and after hearing oral argument on the motion on February 24, 1998, the Court has reached the following conclusions.

Defendants contend that Christie, Manson &Woods Ltd, the London subsidiary of Christie's International PLC, is the only proper party to this case and that Christie's International PLC, the parent corporation, and Christie's Inc, a New York

subsidiary, therefore must be dismissed from the case. The Court finds that plaintiff has alleged sufficient facts in the complaint to maintain all three defendants in the action. Mr. Fastov has alleged that the three defendants have "acted in concert and conspired together to commit the fraud and other wrongs complained of herein." First Amended Complaint at ¶ 9. Mr. Fastov also alleges in his original complaint that "certain employees. known and presently unknown to Fastov, of [Christie's International PLC and Christie's Inc.] also participated in and conspired, while acting in the scope of their authority and employment with the Directors of [Christie. Manson & Woods, Ltd] with respect to [Christie Manson & Woods, Ltd's] said breach, performance and non-performance of such agreement." Complaint at ¶ 2. Accepting plaintiff's allegations as true, plaintiff has alleged sufficient facts to sustain claims against all three defendants. Kowal v. MCI Communications, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (on motion to dismiss, Court must accept as true plaintiff's factual allegations set forth in the complaint); Estate of Carter v' District of Columbia, 903 F.Supp. 165, 167 (D.D.C. 1995) (same).

Defendants also contend that plaintiff has failed to state a claim because he has not alleged that he was damaged by defendants' alleged conduct. Throughout his complaint, however. plaintiff alleges that defendants' actions directly caused diminution in the value of his property and caused emotional distress. See, e.g., First Amended Complaint at ¶¶ 40, 54, 59, 78, 81. These allegations of damages are sufficient to satisfy the damages elements of plaintiff's claims.

Finally, defendants claim that the District of Columbia's Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq.*, does not apply to this transaction because the negotiations that led to the alleged oral contract took place over the phone and defendants' allegedly tortious conduct took place in London. Mr. Fastov, however, was in the District of Columbia when he allegedly entered into the transaction, and the painting at issue in this case is located in the District of Columbia. In addition, Mr. Fastov has alleged that one of the defendants, Christie's International PLC, has an office in Georgetown and that he dealt with persons in that office in making his decision to use Christie's consignment services . See First Amended Complaint at ¶¶ 5, 14. Under the circumstances. Mr. Fastov has alleged sufficient facts to sustain his claim under D.C. Code § 28-3904. See Williams v. Central Money Co., 974 F.Supp. 22, 27 (D.D.C. 1997). Obviously, this issue, as well as matters relating to Mr. Fastov's other claims, can be revisited on a motion for summary judgment. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the amended complaint is DENIED.

A Scheduling Order shall be issued this same day.

SO ORDERED.

/s/ PAUL J. FRIEDMAN
United States District Judge
DATE: 2/27/98

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV, Plaintiff,	)	
v.	)	Civil Action No.
	)	97-0578 (PLF)
CHRISTIE'S INTERNATIONAL	)	(DAR)
	)	
	)	Filed
PLC, et al.,	)	JUN 27, 2000
	)	Nancy Mayer
Defendants	)	Whittington,
	)	Clerk U.S.
		District Court

ORDER

In response to defendants' motion for summary judgment, plaintiff has attempted to file a 59-page opposition, a 90-page declaration in support of his opposition, a 461-page statement of disputed and undisputed facts, and three volumes of exhibits totaling approximately 1,500 pages. A first-year law student is taught that a filing in support of or in opposition to any motion should be tailored to achieve the paramount goal of assisting the Court in rendering its decision. Plaintiff's filing does the opposite. It is an abuse of the litigation process.

Plaintiff's filing seriously brings into question the judgment and discretion of his legal counsel - whether it is still the law firm of Spector Gadon & Rosen that is advising him, as the papers indicate, or whether he is now representing himself, as recent telephone calls to Chambers imply. If plaintiff is now calling the shots in this case on the assumption that his law degree gives him the wisdom and discretion (or lack thereof) to submit a filing such as this, his counsel may have violated Rule 1.2 of the Rules of Professional Conduct by permitting him to do so. Plaintiff's well-documented proclivity in this case to engage in obstructionist litigation tactics at the expense of the Court, opposing counsel, and even his own attorneys will be tolerated no longer. Accordingly, it is hereby

ORDERED that plaintiff's opposition and supporting documents delivered to the Court on June 20, 2000, will not be accepted for filing by the Clerk of the Court. Plaintiff is instructed to retrieve his documents on or before June 30, 2000. If plaintiff's opposition and supporting documents are not picked up by close of business on that date, the Clerk of the Court shall promptly dispose of them; it is

FURTHER ORDERED that plaintiff is instructed to file his response to defendants' motion for summary judgment on or before July 7, 2000. Plaintiff's memorandum in support of his opposition shall not exceed 60 pages in length. See Order of April 21, 2000 Plaintiff's declaration in support of his opposition shall not exceed 30 pages in length.

Plaintiff's statement of material facts in dispute shall not exceed 30 pages in length. Any exhibits plaintiff wishes to file in support of his opposition shall not exceed a total of 200 pages. All of these filings, save for exhibits, shall conform with the following specifications: 8 1/2 x 11 paper; one-inch margins; 12 point Times New Roman font; and double spacing. See LCvR 5.1(f); it is

FURTHER ORDERED that defendants shall file a reply to plaintiff's opposition on or before August 4, 2000. The length of defendants' reply shall conform with the local rules; and it is

FURTHER ORDERED that the Court hereby places plaintiff on notice that from the date of this Order forward, plaintiff will be personally fined and sanctioned every time the Court determines that he has abused the litigation process - regardless of whether he is represented by counselor is proceeding *pro se.*

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: 6/22/00

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV, Plaintiff,	)	
v.	)	Civil Action No. 97-0578 (PLF) (DAR)
CHRISTIE'S INTERNATIONAL PLC, et al.,	)	Filed August 29, 2000 Nancy Mayer Whittington, Clerk U.S. District Court
Defendants	)	

ORDER

The Court has received a 45-page motion from plaintiff for leave to file a surreply in support of his opposition to defendants' motion for summary judgment. The motion is accompanied by more than 40 pages of declarations, statements and transcripts, among other things. The motion, which was filed *pro se* despite the fact that plaintiff is represented by counsel, requests the Court to allow a surreply to be filed with minimal restrictions on its length and without any limitations on the length of supporting declarations and exhibits.

The motion will be stricken from the record. No

motion for leave to file requires 45 pages of argument and 40 pages of exhibits. Such a filing, particularly in light of previous warnings to plaintiff, is an abuse of the litigation process and a waste of the Court's time. In response to plaintiff's recent attempt to file several hundred pages in support of his opposition to defendants' motion for summary judgment, the Court admonished plaintiff that his tendency to flood the Court and opposing counsel and his apparent refusal to heed the advice of counsel would be tolerated no longer. See Order of June 27, 2000. The Court also advised plaintiff's counsel, the law firm of Spector Gadon & Rosen, that if they continued to permit plaintiff to act *pro se* whenever it seemed to suit him, counsel might be violating Rule 1.2 of the Rules of Professional Conduct. See id. at 1-2. Plaintiff and counsel were placed on notice that "from [June 27, 2000] forward, plaintiff will be personally fined and sanctioned every time the Court determines that he has abused the litigation process - regardless of whether he is represented by counselor is proceeding *pro se.*" Id. at 3.

Upon consideration of the foregoing, it is hereby

ORDERED that plaintiff's motion for leave to file a surreply, dated August 18, 2000, shall be STRICKEN FROM THE RECORD by the Clerk of the Court; it is

FURTHER ORDERED that plaintiff may refile his motion for leave to file a surreply on or before September 8, 2000, although it is most unlikely that

the Court will grant such a motion inasmuch as neither the Federal Rules of Civil Procedure nor the Rules of this Court provide for surreplies, see Rule 7, Fed. R. Civ. P.; LCvR 7, and because the proposed surreply appears to be for the purpose of circumventing the limits placed on plaintiffs earlier filings by this Court's Order of June 27, 2000. If plaintiff chooses to refile his motion for leave to file a surreply, defendants shall file a response by September 15, 2000; plaintiffs reply, if any, shall be filed by September 22, 2000; it is

FURTHER ORDERED that if plaintiff chooses to refile his motion for leave to file a surreply, it shall comport with Rule 5.1 of the Local Civil Rules and shall not exceed 15 pages, including the memorandum, declarations, statements, exhibits, or anything else that plaintiff may wish to add. This page limit shall not, however, apply to pages 12-20 of Mr. Fastov's hereby stricken memorandum in support of his motion for leave to file a surreply, which may be filed as a separate exhibit and will not count against the fifteen page limit.[1] Defendants' response and plaintiff's reply, if any, shall comply with the same restrictions placed on plaintiff's motion; it is

FURTHER ORDERED that the Court will postpone its consideration of sanctions against Mr. Fastov and the law firm of Spector Gadon & Rosen until after defendants' motion for summary judgment has been resolved; and it is FURTHER

[1] Plaintiff maintains in his reply in support of his motion for leave to file a surreply that these pages demonstrate that there is no merit to defendants' summary judgment motion.

ORDERED that, on or before September 8, 2000, the law firm of Spector Gadon & Rosen shall advise the Court in writing as to the status of its representation of Mr. Fastov. If the firm no long represents Mr. Fastov, as the now-stricken motion implies, counsel shall file a motion to formally withdraw that conforms to the Rules of this Court. See LCvR 83.6. If the firm still represents Mr. Fastov, it shall file a memorandum explaining why Mr. Fastov has been permitted to file selective filings *pro se* and why counsel have failed to advise him of proper litigation procedures.

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: 8/29/00

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV,
Plaintiff,

v. 1:97cv0578 (PLF)

CHRISTIE'S INTERNATIONAL PLC, and CHRISTIE, MANSON & WOODS, LTD.,
Defendants.

NOTICE TO THE PARTIES

Before this court, upon intercircuit assignment from the United States District Court for the District of Columbia, is the defendants' motion for summary judgment. Doc. 81. The parties are hereby notified that the court will take the motion for summary judgment under advisement on January 16, 2006. If the parties have any additional evidence or argument to submit to the court regarding the motion, such must be filed on or before the advisement date. No additional filings are required, however; and neither oral argument nor any other hearing is contemplated.

DONE AND ORDERED this 7th day of December, 2005.

/s /William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF FLORIDA
(SITTING BY DESIGNATION)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert S. Fastov,
Plaintiff

v.

Christie's International PLC, et al.,
Defendants

JUDGMENT

Pursuant to a directive of Judge William Stafford, Jr. in a Court Order dated February 22, 2006, it is, by the Court,

ORDERED that Judgment is hereby entered in favor of Defendants, CHRISTIE'S INTERNATIONAL PLC, CHRISTIE, MANSON & WOODS, LTD, and CHRISTIE'S INC. against the Plaintiff, ROBERT S. FASTOV, and it is,

FURTHER ORDERED that the defendants shall have and recover costs from the Plaintiff.

NANCY MAYER-WHITTINGTON, Clerk

BY: /s/ Joseph Burgess. Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV, Civil Action No. 97cv0578 (PLF)
Plaintiff

v.

CHRISTIE'S INTERNATIONAL PLC, ET AL.,
Defendants

CORRECTED ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The claims in this case arose when the plaintiff, Robert S. Fastov ("Fastov"), an art dealer, unsuccessfully attempted to sell a painting through Christie, Manson & Woods, Ltd. ("CMW"), a London-based fine art auctioneer. Fastov sues CMW, as well as two related entities, Christie's International PLC and Christie's, Inc. (collectively, "Christie's"), alleging breach of an oral contract, negligent misrepresentation, fraudulent misrepresentation, fraud in the inducement, breach of fiduciary duty, negligence, intentional infliction of emotional distress, and violation of the District of Columbia's consumer protection statute.

Before the court at this time are Christie's motion for summary judgment (doc. 81); Fastov's response in opposition to the motion (doc. 90); Christie's reply (doc. 91);

and Fastov's surreply (doc. 107). The court notified (doc. 110) the parties that Christie's motion for summary judgment would be taken under advisement as of a date certain, and Fastov has since filed supplementary materials (doc. 113) in opposition to Christie's motion.

I.

A

Fastov is an attorney who formerly worked as a litigator for the United States Government. In late 1985, after resigning his position with the government, Fastov began working full time as an art dealer preparing and offering art at auction. In 1987, he opened Fastov Galleries in Annapolis, Maryland. That business, a sole proprietorship, remained in operation until late 1990, at which time Fastov stopped selling art directly to customers but continued to sell art through auction and, occasionally, through consignment. After closing his gallery, Fastov kept his large inventory of paintings, valued at approximately $3,000,000, at his residence.

In the late 1970s or early 1980s, Fastov sold a collection of French Barbizon art through Christies, Inc. ("CI"), a New York based corporation doing business in the United States. Although the art was sold, Fastov felt that the CI transaction was "unsatisfactory in terms of what they should have gotten for some of the works of art." Fastov Dep. at 35. In 1989, he sold a number of art works through consignment to London-based CMW. He signed a consignment agreement at the time and was generally aware that CMW consults with outside

experts for opinions on authenticity. Again, Fastov felt that the auctioneer "did not do a good job in terms of selling" at least a

part of the consigned artwork. Id. at 43.

The painting at issue in this case is a landscape with shepherd and sheep in the foreground, a river meandering through the center, and a castle-topped hill and city in the background. Fastov purchased this painting in 1985 from an antiques dealer in Pennsylvania for $600. At the time of purchase, the painting was covered with a dark yellow varnish. Recognizing that the painting could be worth substantially more than $600, Fastov consulted with a conservator before he attempted to clean the painting. According to Fastov, once cleaned, the painting was in "A-1, untouched" condition, with the name "Schindler" appearing on the canvas. Fastov researched the name, concluding that the artist was most likely Emil Jakob Schindler, a nineteenth century Austrian painter.

To confirm his conclusion about the identity of the artist, Fastov sought the opinion of Dr. Gerbert Frodl ("Frodl"), then Director of nineteenth century art at the Osterreichische Galerie, the Austrian national museum of art in Vienna, a museum devoted primarily to works of Austrian art, including approximately 40 works by Schindler. In his letter to Frodl, Fastov asked not only for an opinion regarding the authenticity of the painting but also for information about the location depicted in the painting. With his letter, Fastov sent what Fastov describes as "quality" black and white photographs, with close-ups of the signature, taken by a National

Gallery of Art staff photographer. Frodl responded (in German) to Fastov's inquiry about the painting as follows:

> Thank you very much for your kind letter with the question
>
> Page 4 of 25
>
> about the picture by Emil Jacob Schindler. Please excuse my tardy reply. I have tried to work with your painting in order to make a binding judgment. It would be necessary to know the original, but I believe I can say this much: that I, like you, believe that the painting is of Schindler's hand (it comes from the hand of Schindler), [although] the foreground with the 'sheep and also the representation of the water is rather untypical. However, as we know, between a photo, even if it is very good, and the originals there is a difference.

Biester Decl., Ex. 6 (Frodl letter, with translations).

In 1989, Fastov sent the painting, on consignment, to Sotheby's in New York, a major auction house and direct competitor of Christie's, at least in the international market. Sotheby's listed Fastov's painting in its pre-sale catalog as having an estimated value of $50,000 to $70,000, with a reserve price of $50,000. [2] Fastov provided Frodl's letter to Sotheby's but decided--in consultation with a Sotheby's employee--not to include any mention of Frodl in the pre-sale catalog. According to Fastov:

> [T]here was [sic] some fundamental flaws in terms of how [Frodl] was assessing Schindler. So, you take that, together with his language about atypicality, and there is not a binding judgment

---

[2] The "reserve" price is the price below which an item will not be sold.

and I didn't believe it was appropriate, quite frankly.

Fastov Dep. at 111. Sotheby's offered the painting at its 1989 fall auction, but no one offered to bid in excess of $50,000. The painting was thereafter returned to Fastov.

In early 1993, Fastov received a Christie's magazine and brochure advertising a sale of German/Austrian art to be held in London in May, 1993. After calling Christie's office in Washington, D.C., to inquire about the mechanics of sending artwork to

London, Fastov wrote to CMW on February 11, 1993, to propose the consignment of four works of art, including the Schindler landscape. Fastov included photographs of the Schindler painting, as well as a close-up of the signature, with his letter.

Wendy Goldsmith ("Goldsmith"), a member of CMW's 19th Century Continental Pictures Department, phoned Fastov after receiving his letter. Goldsmith encouraged Fastov to ship his painting to London quickly, because CMW "needed an opportunity to review it in advance of the auction." Goldsmith Decl. at ¶ 7. Goldsmith provided Fastov with an estimated sale price of £50,000 to £70,000 pounds, subject to her actual inspection of the painting. Goldsmith lowered her estimate to £40,000 to £60,000 after she learned that the painting had been offered but not sold in a Sotheby's auction. According to Goldsmith, prior to receipt of the painting in London, all of her discussions with Fastov were preliminary and contingent upon receipt and review of the painting.

In March, 1993, Fastov shipped the painting to CMW at his own expense. The terms of the agreement between CMW and Fastov were set out in a form entitled "Receipt" that was sent to Fastov on March 5, 1993. Printed on the back side of that Receipt were the "Conditions of Business" applicable to sellers. Among the many conditions were the following:

(a) Christie's shall have absolute discretion as to:

(i) whether the Lot is suitable for sale by Christie's, and if so as to the place and date of sale, the conditions of sale and the manner in which such sale is conducted;

(ii) the description of any Lot in the catalogue;

(iii) whether the views of any expert shall be obtained ....

(b) Christie's reserves the right to withdraw any property at any time before the actual sale if, in Christie's sole judgement:

(i) there is any doubt as to its attribution or to its authenticity.

Goldsmith Decl., Ex. A. Fastov returned a signed copy of the Receipt to CMW in April, 1993. Although Fastov made notations on the Receipt, the above conditions were left unmarked.

Goldsmith and Mark Poltimore ("Poltimore"), Deputy Chairman of CMW, examined the painting after it arrived in London. Their shared opinion at the time was that the painting appeared to be authentic. Because the painting "had no meaningful provenance and did not appear in the published authoritative book on Schindler," Goldsmith and Poltimore decided--consistent with their usual

practice--to get an expert opinion regarding the painting's authenticity. Goldsmith Decl. at ¶ 12. To that end, Goldsmith and Poltimore sent transparencies to Dr. Johanna Schonburg-Hartenstein ("Schonburg-Hartenstein"), then the head of Christie's Vienna office. Schonburg-Hartenstein, in turn, submitted the transparencies to Frodl, considered by Schonburg-Hartenstein to be a reliable authority on paintings by Schindler.

In response to Schonburg-Hartenstein's request for an opinion as to authenticity, Frodl reported that, while he recognized the painting from a previous inquiry, he could not give an opinion about tinc authenticity of the painting without actually viewing the original. Schonburg-Hartenstein reported Frodl's inability to commit to an opinion about

authenticity to Goldsmith, who then, in consultation with Poltimore, decided not to include Fastov's painting in the May 20, 1993, sale. The painting was never included in the pre-sale catalog, and the public was never made aware that CMW had decided not to offer the painting for sale.

On March 31, 1993, Goldsmith advised Fastov that the painting would not be included in the upcoming May sale because Frodl could not commit to an opinion with respect to authenticity. Goldsmith offered to ship the painting--at Fastov's expense--to Vienna for Frodl's inspection, but Fastov declined the offer. Goldsmith then proposed to return the painting to Fastov, but Fastov rejected that proposal as well.

Fastov became upset when he learned about CMW's refusal to include his painting in the May

sale. On April 2, 1993, Fastov called Schonburg-Hartenstein and was told, again, that Frodl had not reached a decision, one way or another, about the authenticity of the painting but had merely declined to offer any opinion based on photographs and transparencies. Schonburg-Hartenstein urged Fastov to send the painting to Vienna for Frodl's inspection; she even offered to be Fastov's spokesperson in dealing with Frodl should Fastov agree to do so. According to Schonburg-Hartenstein, Fastov was very upset and emotional throughout his call to her. Indeed, based on the tone of her conversation with Fastov and given her prior experience with Frodl, Schonburg-Hartenstein warned Fastov that it would not be prudent to try to force Frodl to give an opinion by an aggressive or confrontational approach.

By letter dated May, 1, 1993, Fastov contacted Dr. Heinrich Fuchs ("Fuchs"), author of a published compilation of Schindler's paintings. Although his letter to Fuchs

focused largely upon Fastov's request for information about the scene depicted in the painting, Fastov stated in conclusion: "In sum, given the photos and information I have provided, it would not be burdensome or difficult for you to provide me with a letter authenticating my painting as having been executed by Emil Jakob Schindler." Biester Decl., Ex. 8 at 6. By "Gutachten" (certificate of authenticity) dated June 15, 1993, Fuchs in fact rendered an opinion that Fastov's painting was an authentic Schindler.

Fastov contacted CMW in November, 1993, to

inform the auction house about the Fuchs Gutachten. Fastov spoke to Nicholas Maclean, who was then a member of CMW's Nineteenth Century Continental Pictures Department. Fastov says that he urged Maclean to offer the painting for sale based on the Fuchs Gutachten but was informed that CMW would not auction the painting without first obtaining a positive opinion from Frodl.[3]

Thereafter, despite having obtained the Fuchs Gutachten, Fastov made no effort to sell the painting at another auction house. Instead, he left his painting in CMWs possession while he continued to badger both Frodl and CMW, insisting that Frodl offer a positive opinion as to the painting's authenticity and that CMW sell the painting at auction as a genuine Schindler.

On or about January 19, 1994, Fastov sent Frodl a 19-page single-spaced letter with a 31-page single-spaced appendix. The letter was accusatory in tone and

promised legal action against Frodl if Frodl failed to provide Fastov with either an unqualified Gutachten or "a detailed responsive rationale for [his] disagreement with Dr. Fuchs." Biester Decl., Ex. 12 at 19. In Fastov's words:

> Dr. Frodl, it is as certain as Wien is the capital of Osterreich that I will respond to your silence by initiating and pursuing to their successful

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[3] Maclean's only recollection of his conversation with Fastov was that Fastov opened the conversation by saying: "My name is Bob Fastov and I am a professional litigator." Biester Decl., Ex. 11 at 164-65.

conclusions one and probably more of these options which, obviously, include certain litigation options. Whatever you may think of my art expertise, I can assure you that as Deputy Chief Counsel in charge of a major U.S. Government agency litigation unit for over 13 years, I developed an excellent reputation and experience in a wide variety of lawsuits that are far more complex than the issues raised by this matter, involved, generally, millions of dollars and generated a great deal more publicity than this matter will. In this last regard, you can assume, however, that the Austrian and European publicity generated by these options will be more than sufficient. I also have significant experience in legal claims and litigation involving art issues, in general, and questions of expert opinion and authenticity of art. Finally, I have the financial incentive (damages in excess of $100,000) ... and more than ample financial resources and time to pursue this matter doggedly, thoroughly, and wisely to a successful conclusion.

Biester Decl., Ex. 12 at 18-19.

Frodl was offended by Fastov's letter, which he viewed as "an attempt to force [him], by means of threats and insults, to give a confirmation of authenticity for Mr. Fastov's painting." Frodl Decl. at 1110. Frodl responded to Fastov by letter dated March 11, 1994, explaining that he was both unable and unwilling to give Fastov any opinion, much less a binding one, on the basis of photos; that he had never challenged the authenticity of Fastov's painting; that he had never called the painting a falsification; and that he had not given Christie's either a binding or a non-binding opinion, positive or

negative, as to the painting's authenticity. Biester Decl., Ex. 13, Frodl letter and translation. In concluding his response to Fastov, Frodl advised Fastov that he (Frodl) was "not available to [Fastov] for an expertise." Id. As Frodl explained in his declaration, he "wanted to convince Mr. Fastov that nothing could be gained by continuing to contact [him]." Frodl Decl. at ¶ 11.

On or about March 23, 1994, Fastov phoned Poltimore. During a call that lasted more than one hour, Fastov accused CMW and/or Frodl of having called his painting a "fake." Poltimore once again explained that Frodl had never advised CMW that the painting was a fake. Poltimore described Fastov's demeanor during the call as "threatening and very emotional." Poltimore Decl. at ~ 31. When Fastov threatened to bring suit, Poltimore asked Fastov to put his complaints in writing.

Approximately three months later, Poltimore received a 79-page, single-spaced typewritten letter (with hundreds of pages of attachments) from Fastov. Fastov explained that, unless CMW agreed to his settlement proposal ($168K), he was prepared to file a lawsuit for compensatory damages in excess of $265,000 and "punitive damages in an amount to be determined, but considerably in excess of $1,000,000." Biester Decl., Ex. 14 at 1. He then suggested to Poltimore that "the cash outlays that Christie's will, to a legal certainty, have to make (and will not recover, even if Christie's wins) to defend the litigation will be approximately $221.3K (very conservatively understated) or (more realistically) well in excess of $300K." Id. at 3

(emphasis in original). Characterizing his statements not as threats but as simple statements of business fact, Fastov gave Poltimore three weeks in which to respond to his letter. Fastov went on to state:

> [I]f you decide for tactical purposes to delay your response beyond my three week deadline, Christie's costs of settlement will increase appreciably. If you decide to wait to see if I actually file the suit before approaching me to discuss settlement, you will find that the chances of achieving settlement are virtually nil, unless Christie's is prepared to reimburse me for all of my costs to date of settlement and pay all of my compensatory damages, which will be well in excess of $265K, and an extremely high percentage of the amount of punitive damages prayed for in the complaint, which shall be in the millions of dollars.

Id. at 5.

In concluding his lengthy letter, Fastov wrote:

> Do not bet against my inclination, will, ability, experience, and tenacity to file and successfully maintain F v. C through to its successful conclusion. It will be the worst and most costly conclusion and bet of your life. The settlement proposals and the purposes of this letter are inherently pacific in nature. If you and Christie's force me to go to war, those who have litigated for, with, and against me will tell you that I am extremely tough, intelligent, and tenacious I give no quarter and ask none, and above all, I will take any and all actions, both within and without the courtroom, that do not violate the legal rules of

professional conduct, necessary to achieve Christie's unconditional surrender.

.Id. at 79.

CMW responded to Fastov's 79-page letter with a brief letter from Maria Ludkin ("Ludkin"), a solicitor in Christie's legal department. Biester Decl., Ex. 15. In her letter, dated July 11, 1994, Ludkin reiterated that CMW had been unwilling to sell Fastov's painting because Frodl had been unwilling to commit to an opinion on the basis of photographs. She reminded Fastov that it was he, Fastov, who had declined to make

arrangements for the picture to be sent to Vienna for visual inspection. Ludkin otherwise communicated CMWs denial of all of Fastov's allegations of negligence and misrepresentation.

At Fastov's insistence, CMW retained custody of the painting until the summer of 1997 when Fastov first requested its return. Goldsmith personally delivered the painting to Fastov in Washington, D.C., on August 20, 1997. At the time the painting was turned over to him, Fastov had his own expert inspect the painting under a black light. Fastov's expert confirmed aloud that the painting had not been damaged by CMW.

B.

Fastov filed a 225-page complaint in this case on March 21, 1997, nearly four years after CMW declined to include Fastov's painting in its May, 1993, auction of German and Austrian art. Christie's moved to dismiss the complaint, arguing, among other things, that the complaint failed to comply with Rule 8(a) of the Federal Rules of Civil

Procedure. The court granted the motion with leave to re-plead.

On October 24, 1997 Fastov filed his eight-count, 45-page amended complaint. Christie's again moved to dismiss, but the motion was denied. The parties then engaged in substantial and costly discovery.

On June 27, 2000, the court entered an order placing Fastov on notice that "from the date of this Order forward, [Fastov] will be personally fined and sanctioned every time the Court determines that he has abused the litigation process - regardless of whether he is represented by counselor is proceeding *pro se."* Doc. 89. at 3. The court began its order by stating:

> In response to defendants' motion for summary judgment, plaintiff has attempted to file a 59-page opposition, a 90- page declaration in support of his opposition, a 461-page statement of disputed and undisputed facts, and three volumes of exhibits totaling approximately 1,500 pages. A first-year law student is taught that a filing in support of or in opposition to any motion should be tailored to achieve the paramount goal of assisting the Court in rendering its decision. Plaintiff's filing does the opposite. It is an abuse of the litigation process.

Id. at 1. The court went on to explain that "Plaintiff's well-documented proclivity in this case to engage in obstructionist litigation tactics at the expense of the Court, opposing counsel, and even his own attorneys will be tolerated no longer." Id. at 2.

By order filed August 29, 2000, the court struck from the record Fastov's 45-page motion for leave to file a surreply in support of his opposition to

Christie's motion for summary judgment. The motion was accompanied by 40 pages of exhibits. The court explained that "[s]uch a filing, particularly in light of previous warnings to plaintiff, is an abuse of the litigation process and a waste of the Court's time." Doc. 95 at 1. The parties were informed that "the Court will postpone its consideration of sanctions against Mr. Fastov until after defendants' motion for summary judgment has been resolved." Id. at 3.

II.

Fastov's amended complaint contains eight counts, one each for breach of an oral contract, misrepresentation, negligent misrepresentation, fraudulent fraud in the inducement, breach of fiduciary duty, negligence, intentional infliction of emotional distress, and violation of the District of Columbia's consumer protection statute. All of

the counts arise from CMW's 1993 decision *not* to auction Fastov's painting. In addition to his claim for punitive damages, Fastov seeks damages for the alleged diminished value of his painting, for the time and *effort* he has expended in pursuing his claims against CMW, and for the emotional distress and health problems allegedly caused by CMW's actions.

III

Among other things, Christie's contends that all of Fastov's claims are barred by the applicable statute of limitations. In the District of Columbia, a three-year statute of limitations applies to both tort and contract claims."[4] D.C. Code § 12-301. In contract

[4] The parties agree to the application of District of Columbia law in this case.

actions, the limitations period runs from the time of the alleged breach. Bembery v. District of Columbia, 758 A.2d 518,519 (D.C. 2000). In tort actions, the limitations period ordinarily begins to run from the date of injury. In cases where "the relationship between the fact of injury and the alleged tortious conduct [is] obscure," Colbert v. Georgetown Univ., 641 A.2d 469,472 (D.C. 1994) *(en banc),* the limitations period begins to run when the plaintiff knows, or with the exercise of reasonable diligence should have known, that he or she suffered an injury as a result of the defendant's wrongdoing. Mullin v. Washington Free Weekly, Inc., 785 A.2d 296,298-99 (D.C. 2001).

In Count VI of his amended complaint, Fastov alleges (1) that he entered into an oral consignment agreement with Christie's, pursuant to which Christie's agreed "not to

seek the opinion of an outside expert to confirm the authenticity of the painting;" Am. Compl. at ¶ 83; (2) that Christie's breached the agreement "when it approached Frodl to obtain an opinion on the authenticity of the painting, and when it withdrew the Schindler painting from the May 20, 1993 catalogue and sale;" id. at ¶ 84; (3) that under their agreement "Christie's had an implied obligation to Fastov of good faith and fair dealing, which included, among other things, the obligation to use its best efforts to promote Fastov's painting and to protect his interests;" id. at ¶ 85; and (4) that "Christie's breached its obligation of good faith and fair dealing by consulting with Frodl without seeking Fastov's

permission; ... and by failing to use its best efforts to protect the market value of the Schindler painting and to obtain the highest sale price therefore." Id. at ¶ 86.

Christie's contends, and the court agrees, that the alleged breaches (consulting Frodl, refusing to sell the painting in the May 1993 auction, failing to promote and/or obtain a high price for the painting) occurred on or before May 20, 1993.[5] The limitations period thus began to run on Fastov's breach of contract claim (including his claim for breach of the implied covenant of good faith and fair dealing) no later than May 20, 1993. When Fastov filed his breach of contract claim on March 21, 1997, the

applicable limitations period had long since elapsed, making Fastov's contract claim untimely.

The court is not convinced otherwise by Fastov's fanciful assertion that he had no reason to know about CMW's alleged breaches until March 21, 1994, exactly three years before he filed suit. On that date, Fastov allegedly obtained a translation of Frodl's letter dated March 11, 1994. In that letter, Frodl advised Fastov that he (Frodl) had never informed

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[5] Christie's assumes, for purposes of its timeliness argument, that the parties had an oral agreement as alleged by Fastov. Christie's is otherwise adamant that no such agreement existed. Indeed, but for Fastov's unsupported and illogical assertions to the contrary, the record is replete with evidence that Goldsmith did not and could not enter into an agreement utterly at odds with Christie's written Conditions of Business, Conditions of Business that were acknowledged and accepted by Fastov when he signed and returned the written Receipt to CMW.

CMW, or anyone else, that Fastov's painting was a fake. Insisting that CMW told him that his painting was pulled from the auction because Frodl had said it was a fake, Fastov maintains that there would have been no breach of contract had the painting actually been a fake. *It* follows, according to Fastov, that his contract action did not arise until he learned that CMW "had been systematically lying to him about the approach to Frodl and about the authenticity of the painting." Doc. 90 at 29. *It* was only then, he says, that he had reason to believe that CMW had breached its oral agreement.

Fastov relies on the "discovery rule" for tolling the running of the statute of limitations. Under that rule, a cause of action accrues for limitations purposes "when the plaintiff has either actual notice of [his] cause of action or is deemed to be on inquiry notice because if [he] had met [his] duty to act reasonably under the circumstances in investigating matters affecting [his] affairs, such an investigation, if conducted, would have led to actual notice." Diamond v. Davis, 680 A.2d 364, 372 (D.C. 1996); see also Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192,1201-04 (D.C. App. 1984) (explaining that under the discovery rule recognized in the District of Columbia, where a breach is

difficult to discover, the statute does not run until the injured party should have known of the breach).

The court, however, finds no basis for applying the discovery rule in this instance. The purported breach was not one that was difficult to discover, particularly for a self-professed sophisticated litigator, one who well knew how to investigate matters

affecting his affairs. Fastov knew as early as March 19, 1993, that CMW had approached Frodl about Fastov's painting; he knew that Frodl had previously declined to give him, Fastov, an opinion about the authenticity of the painting; he knew how to contact Frodl if he had any questions about what transpired between Frodl and CMW; he knew as early as March 31, 1993, that CMW declined to offer the painting for sale based on its contact with Frodl; and he knew in the fall of 1993 that CMW continued to refuse to sell his painting even though, by then, Fastov had received a certificate of authenticity from Fuchs. Quite simply, to the extent, if any, that the alleged oral agreement existed, Fastov knew or reasonably should have known about any alleged breach of that agreement considerably more than three years before he filed suit.

Fastov's tort claims are no more timely than his contract claim. *In* essence, *all* of Fastov's tort claims are premised on his allegations that CMW: (1) falsely informed Fastov that CMW would not seek the advice of an outside expert with respect to the authenticity of the Schindler painting; (2) falsely informed Fastov that there was no need consult an outside expert because CMW's in-house experts had themselves agreed that the Schindler painting was authentic; (3) falsely informed Fastov that Frodl had submitted a negative opinion as to the painting's authenticity; (4) falsely informed

Fastov that CMW withdrew the painting from the German-Austrian auction based on Frodl's negative opinion; (5) falsely informed Fastov that Frodl would put his "nonexistent negative opinion" in writing if

Fastov confronted Frodl; (6) falsely informed Fastov that the painting would sell for a price in excess of £70,000; and (7) falsely informed Fastov that Frodl could not offer a positive opinion on authenticity as a result of Fastov's failure or unwillingness to ship the painting to Vienna for inspection. Accepting, for the sake of argument, the truth of these allegations, the court is convinced by ample record evidence that Fastov either knew or, with the exercise of reasonable diligence, should have known that he suffered an injury as a result of CMW's alleged tortious conduct more than three years before he filed suit. Like his contract claim, Fastov's tort claims are barred by the statute of limitations.

IV.

Even *if* Fastov's claims were timely, they would nonetheless fail on the merits.

A.

In Count VIII of his amended complaint, Fastov seeks relief for intentional infliction of emotional distress. To establish intentional infliction of emotional distress, "a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) either intentionally or recklessly (3) causes the plaintiff severe emotional distress." Smith v. District of Columbia, 882 A.2d 778, 794 (D.C. 2005) (quoting Larijani v. Georgetown Univ., 791 A.2d 41,44 (D.C. 2002». The required element of "outrageousness" is central to the tort and is not an easy requirement to meet. Indeed, "the conduct must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly

intolerable in a civilized community." Id. (internal quotations and citations omitted). "The ultimate question is whether the recitation of the facts to an average member of the community would arouse his [or her] resentment against the actor, and lead him [or her] to exclaim 'Outrageous!'" Id. (internal quotation and citations omitted).

"It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." Drejza v. Vaccro, 650 A.2d 1308, 1316 (D.C. 1994) (quotations and citations omitted). In this case, where the parties were involved in an arm's-length business transaction, the court concludes that Fastov has fallen far short of either alleging or demonstrating the kind of extreme or outrageous conduct that would permit recovery. See Heywood v. Cruzan Motors, Inc., 792 F.2d 367, 371 (3d Cir. 1986) (concluding that the defendant's failure to honor express and implied terms of the parties' contract and conditions of sale in their business relationship did not state a claim for intentional infliction of emotional distress). Fastov has submitted no evidence that would shock the conscience or exceed all possible bounds of decency. His intentional infliction of emotional distress claim thus fails as a matter of law.

B.

Fastov's statutory claim likewise fails as a matter of law. In Count IV of his amended complaint, Fastov alleges that Christie's violated the District of Columbia Consumer Protection Procedures Act (the

"CPPA") by making false, deceptive and misleading statements to Fastov. D.C. Code § 28-3904. At all times relevant to this

lawsuit, the CPPA provided that "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a trade practice in violation of a law of the District of Columbia within the jurisdiction of the Department [of Consumer and Regulatory Affairs] may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following: (A) treble damages; (B) reasonable attorneys' fees; (C) punitive damages; (D) any other relief which the court deems proper." D.C. Code § 28-3905(k)(1) (1997). The CPPA thus explicitly linked the scope of private civil actions to the jurisdiction of the Department of Consumer and Regulatory Affairs.

There is a well-established presumption that domestic laws are *not* intended to operate extraterritorially.

> [U]nless the intention to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it. Thus, an extraterritorial effect is not to be given statutes by implication. Thus, the general rule is that no state or nation can by its laws

directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction.

73 Am. Jur. 2d, Statutes, § 250 (2005); see also Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (affirming the general presumption against the extraterritorial application of statutes); Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (explaining that "the extraterritoriality principle provides that '[r]ules of the

United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States'") (quoting Restatement (Second) of Foreign Relations Law of the United States § 38 (1965) and Restatement (Third) of Foreign Relations Law of the United States § 403, Corn. (g) (1987; North Alaska Salmon Co. v. Pillsbury, 162 P. 93, 94 (Cal. 1916) (noting that U[t]he intention to make [a state law] operative with respect to occurrences outside the state will not be declared to exist unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject-matter, or history") (quotations and citations omitted). In this case, the court finds nothing in the CPPA to indicate that the District of Columbia intended the statute to operate extraterritorially, much less in countries overseas.

The court, moreover, finds nothing in the circumstances of this case to overcome the presumption. It was Fastov who approached CMW in

London, not the reverse. Fastov sought out CMW's auctioneering services because he wanted his painting sold at Christie's renowned auction house in London. He negotiated exclusively with CMWs personnel in London. He shipped his painting to London for purposes of the London sale. When he signed and returned to London the Receipt sent to him by CMW from London, he accepted CMW's Conditions of Business, including the provision stating that English law and jurisdiction would govern all matters relating to Fastov's consignment. Biester Decl., Ex. 15 at 2. Given these Circumstances, the court finds no merit to Fastov's CPPA claim.

C.

To succeed with each of his eight causes of action, Fastov must show that he suffered damages as a result of Christie's conduct. Christie's persuasively argues that Fastov has made no such showing. The record establishes that Fastov's painting was in no way physically damaged by CMW. When the painting was returned to Fastov, Fastov and his expert, Conservator Jackie (sic) Creswick, examined the painting "front, back, and sideways" with lighting .equipment, concluding that the painting was "fine" and "in good condition." Creswick Dep. at 19; Fastov Dep. at 329. The record also establishes that CMW's decision *not* to sell the painting was made privately and without notice to the public. The painting was not included in CMW's pre-sale catalog or otherwise advertised by CMW, and Fastov has produced not one shred of evidence to suggest that CMW ever revealed to the public the nature of its

discussions with Frodl, the fact that Fastov consigned the painting to CMW, or the fact that CMW ultimately declined to sell the painting. Finally, the record establishes that, although Frodl declined to render an opinion about the painting's authenticity based on photographs, Fastov received a Gutachten from Fuchs, certifying that the painting was a genuine Schindler.

Fastov does not contend that CMW *publicly* impugned his painting. He nonetheless suggests that Christie's has "effectively killed the painting's market value as an authentic work." Doc. 90 at 15. Fastov's "suggestion" is based on his assertion that it would be unethical for him to sell the painting without revealing the existence of Frodl's and CMWs doubts about authenticity. Id. at 24-25 .

The court, however, finds Fastov's suggestion baseless. In 1994, long before

Fastov filed suit for damages, he received written confirmation from both Frodl and Ludkin (of CMW) that his painting had not been impugned. Frodl informed Fastov in no uncertain terms that he had "never challenged the authenticity of [Fastov's] painting and [had) never called [the] painting a falsification." Biester Decl., Ex. 13 at ¶ 3. Frodl explained to Fastov that CMW had been informally advised in 1993--just as Fastov himself had been advised in 1986--that he (Frodl) could not give a binding opinion, one way or another, without seeing the painting. Ludkin similarly informed Fastov that Dr. Frodl made it clear [to CMW] that he could not give a certain view of the picture until he had the opportunity of seeing the picture itself," and "[i]t was

precisely this uncertainty that led [CMW] to exercise [its] discretion to withdraw the picture from sale." Biester Decl., Ex. 15, at 1. Reminding Fastov that "withdrawal took place before the catalogue was even printed."[6] Ludkin wrote that CMW "entirely denie[s] that you [Fastov] have suffered any loss whatsoever, whether financial or otherwise, as a result [of the withdrawal]." Id.

With Frodl's and Ludkin's letters in his possession, Fastov had—and has--no basis whatsoever for thinking that he cannot sell his painting--a painting certified by Fuchs as a genuine Schindler--without revealing that Frodl and/or CMW purportedly and secretly questioned the painting's authenticity. Fastov, moreover, has produced no

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[6] See Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc., 502 N.Y.S.2d 165 (N. Y. App. Div. 1986) (noting that, had Christie's not withheld material information from its consignor about the consigned artwork's auction appeal and value, the consignor "could have avoided any potential damage by, *inter alia,* withdrawing the paintings from auction prior to their being catalogued").

credible evidence to suggest that his painting lost value while it remained in CMW's possession, that his painting was physically damaged by CMW, that CMW caused his painting to be unmarketable by other auction houses, that CMW made, any statements at all to the public about his painting, that CMW cast a "serious cloud" over his painting by refusing to auction it, that CMW contributed to an alleged "substantial conflict in '" expert opinion" regarding the authenticity of the painting, that "whispers" of the painting's history abound, or that his painting is "effectively dead." Doc. 90 at 22-25. Quite simply, Fastov's claims to damages defy all credulity; indeed, they make sense only when viewed in the context of his open threats to achieve "Christie's unconditional surrender." Biester Decl., Ex. 14 at 79. Without any *credible* evidence of damages, Fastov has grasped at the flimsiest of straws in an attempt to support his otherwise unsupported, unmeritorious claims, claims that were--in the court's view—initiated in bad with the intent to subject Christie's to "the worst and most costly" litigation in Christie's experience. Id. Such straws fall far short of creating a genuine issue of material fact with regard to damages and are clearly insufficient to withstand Christie's properly-supported motion for summary judgment as to all claims.

Furthermore, even *if* the painting owned by Fastov has been diminished in value, the record clearly reveals that any such diminution would not have resulted from what Christie's did or did not do. Rather, any loss in value would have been a direct

result of Fastov's own conduct, both "within and without the courtroom." Biester Decl., Ex. 14 at 79.

The court having found that Fastov's claims are not only untimely but also unmeritorious, it is ORDERED:

1. The defendants' motion for summary judgment (doc. 81) is GRANTED.
2. The clerk is directed to enter judgment in the defendants' favor.
3. The clerk shall tax costs against the plaintiff.

DONE AND ORDERED this 27th day of February , 2006.

/s William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE NORTHERN DISTRICT OF FLORIDA
(Sitting by designation)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV,
Plaintiff

v. Civil Action No. 97cv0578 (PLF)

CHRISTIE'S INTERNATIONAL PLC, AND CHRISTIE MANSON & WOODS, LTD,
Defendants

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SURREPLY AND TO SET A HEARING

Before the court is the plaintiff's motion (doc. 128) for leave to file a surreply and to set a hearing on the defendant's motion for attorney's fees. The defendants have filed a response (doc. 130) in opposition to the plaintiff's motion. The court having reviewed the parties' submissions, it is ORDERED:

The plaintiff's motion (doc. 128) for leave to file a surreply and to set a hearing is DENIED.

DONE AND ORDERED this 23rd day of May, 2006.

/s/ William Stafford

WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert S. Fastov,
Plaintiff

v. 97cv0578 (PLF)

Christie's International PLC, and Christie'Manson & Woods, LTD,
Defendants

ORDER DENYING PLAINTIFF'S MOTION FOR AN EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

Before the court is the plaintiff's motion (doc. 125) for an extension of time to file a notice of appeal. The motion was filed on April 23, 2006. The defendants have responded (doc. 127) in opposition to the motion, and the plaintiff has filed a reply (doc. 129).

On February 22, 2006, this court entered an order (doc. 115) granting the defendants' motion for summary judgment and directing the Clerk to enter final judgment in the defendants' favor. That same day, the Clerk entered final judgment in the defendants' favor, on a separate document, in the civil docket. Under Federal Rule of Appellate Procedure 4(a)(1), the plaintiff's notice of appeal from this final judgment was required to be filed with the district clerk within 30 days after February 22, 2006.

On March 1, 2006, this court issued a notice to the parties, advising them that a

corrected order was entered that day, reflecting correction of several typographical errors that appeared in the order docketed February 22, 2006. The parties were specifically advised that "[n]o substantive change in the [February 22, 2006] order has been made." Doc. 117. An amended judgment was *not* entered in response to the court's corrected order, and the time for filing a notice of appeal was *not* started anew. In other words, for purposes of Rule 4(a)(1), the court's order and judgment were final as of February 22, 2006, the day the Clerk entered the original order and final judgment on the docket.

The plaintiff filed his notice of appeal in this case on March 30, 2006, more than 30 days after final judgment was entered. While the plaintiff contends that his notice was nonetheless was timely because it was entered within 30 days of the date the corrected order was entered, he seeks an extension of time "to protect [himself] in the event the Circuit Court grants Christie's Motion to Dismiss Appeal" Pl.s Mot. at 1

Under Federal Rule of Appellate Procedure 4(a)(5)(A), the district court may extend the time to file a notice of appeal if a party files a motion within 30 days of the expiration of the period provided in Rule 4(a) *and* shows excusable neglect or good cause. Here, although the plaintiff filed his motion within 30 days of the expiration of the time prescribed by Rule 4(a), he has not demonstrated good cause or excusable neglect. As this court noted in its order granting summary judgment in favor of the

defendants, the plaintiff is a self-professed "sophisticated litigator" who--as a long-time member of the District of Columbia Bar and a former "Deputy Chief Counsel in charge of a major U.S. Government agency litigation unit for over 13 years"--describes himself

as having "an excellent reputation and experience in a wide variety of lawsuits that are far more complex than the issues raised by this matter." Doc. 115 at 9. It is disingenuous for the plaintiff to now assert that he is "a *pro* se litigant with no practical knowledge of the practices and law surrounding filing Notices of Appeal or the other nuances of appellate practice." Pl.'s Mot. at 4. It is also disingenuous for the plaintiff to assert that he was ignorant of "Rule 58, F. R. Civ. P. requirement of a single document judgment, being a possible condition precedent to the filling of a notice of appeal, and triggering the 30 day period for filing a notice of appeal." Pl.'s Mot. at 5. Even *if* the court were to accept the plaintiffs self-serving assertion of ignorance, ignorance of the rules does not constitute excusable neglect. Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 US. 380, 392, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (explaining that mere "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect").

Furthermore, the court is not convinced by the plaintiffs assertion that he failed to receive notice of the judgment until April 11, 2006. The plaintiff clearly knew, weeks before April 11, 2006, that a final order had been entered in the case. When he filed his notice of appeal on March 30, 2006, twelve

days *before* he purportedly learned about the judgment, the plaintiff stated that he was appealing from "an order granting Defendants' Motion for Summary Judgment pursuant to Rule 56, F. R Civ. P and instructing the Clerk of the Court to tax costs, per an Amended Order executed by Judge Stafford on February 27, 2006." Doc. 120. While admitting that he "was aware of the existence of the Court's Order of February 22 and its Corrected Order of February

27, 2006, when [he] was considering what to do about an appeal," the plaintiff says that, "as [he] was making [his] decision regarding a notice of appeal, [he] focused on the language of ... [Rule 4(a)(1)], which specified that [he] could file a notice of appeal from an order, as an alternative to filing a notice of appeal from a Judgment." Pl.'s Motion at 9. Assuming, for the sake of argument, that the plaintiff did not learn about entry of judgment until April 11, 2006, he has no one to blame but himself. It was his responsibility to monitor the docket for entry of judgment, and his failure to do so, even after receiving notice that a final order had been entered in the case, cannot excuse a late appeal. See Fed. R. Civ. P. 77(d) (providing that "[lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed"); Witty v. Dukakis, 3 F.3d 517, 520 (1st Cir. 1993) (explaining that "parties to an ongoing case have an independent obligation to monitor all developments in the case and cannot rely on the clerk's office to do their homework for them").

The court finding no merit to the plaintiff's motion

for an extension of time to file a notice of appeal, it is ORDERED:

The plaintiffs motion (doc. 125) for an extension of time to file a notice of appeal is DENIED.

DONE AND ORDERED this 8th day of June 2006

/s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV,

Plaintiff

v. Civil Action No. 97cv0578 (PLF)

CHRISTIE'S INTERNATIONAL PLC, AND CHRISTIE MANSON & WOODS, LTD,
Defendants

ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEY'S FEES

Before the Court is Defendant's Motion for Attorney's Fees (doc. 121). Defendants seek fees pursuant to 28 U.S.C. § 1927 and the Court's inherent authority to impose sanctions for bad faith, vexatious conduct. Plaintiff has responded (doc. 123) to Defendants' motion, and Defendants have filed a reply (doc. 126). For the reasons explained below, Defendants' motion is GRANTED.

I.

In a previous order granting Defendants' Motion for Summary Judgment, the Court described the tortuous history of this case in some detail. See Doc.

115. Among other things, the Court noted that the claims in this case arose when Plaintiff, an art dealer, unsuccessfully attempted to sell a painting through Christie, Manson & Woods, Ltd. ("CMW"), a London-based art auctioneer. After learning that CMW declined to

auction his painting, Plaintiff sent CMW a 79-page, single-spaced typewritten letter (with hundreds of pages of attachments), threatening legal action. In particular, Plaintiff explained that, unless CMW agreed to his settlement proposal ($168K), he was prepared to file a lawsuit for compensatory damages in excess of $265,000 and "punitive damages in an amount to be determined, but considerably in excess of $1,000,000." Biester Decl., Ex. 14 at 1. He also suggested that "the cash outlays that Christie's will, to a legal certainty, have to make (and will not recover, even if Christie's wins) to defend the litigation will be approximately $221.3K (very conservatively understated) or (more realistically) well in excess of $300K." Id. at 3 (emphasis in original). Characterizing his statements not as threats but as simple statements of business fact, Plaintiff gave CMW three weeks in which to respond to his letter. Plaintiff went on to state:

> [I]f you decide for tactical purposes to delay your response beyond my three week deadline, Christie's costs of settlement will increase appreciably. If you decide to wait to see if I actually file the suit before approaching me to discuss settlement, you will find that the chances of achieving settlement are virtually nil, unless Christie's is prepared to reimburse me for all of my costs to date of settlement and pay all of my compensatory

damages, which will be well in excess of $265K, and an extremely high percentage of the amount of punitive damages prayed for in the complaint, which shall be in the millions of dollars.

Id. at 5.

In concluding his lengthy letter, Plaintiff wrote:

> Do not bet against my inclination, will, ability, experience, and tenacity to file and successfully maintain F v. C through to its successful conclusion. It will be the worst and most
>
> Page 3 of 5
>
> costly conclusion and bet of your life. The settlement proposals and the purposes of this letter are inherently pacific in nature. If you and Christie's force me to go to war, those who have litigated for, with, and against me will tell you that I am extremely tough, intelligent, and tenacious. I give no quarter and ask none, and above all, I will take any and all actions, both within and without the courtroom, that do not violate the legal rules of professional conduct, necessary to achieve Christie's unconditional surrender.

Id. at 79.

When his threats proved unavailing, Plaintiff filed a 225-page complaint against CMW and two related entities (collectively, "Defendants") in this Court. During the course of the litigation, the Court more than once admonished Plaintiff for abusing the litigation process. For example, the Court at one time entered an order stating:

> In response to defendants' motion for summary judgment, plaintiff has attempted to file a 59-page opposition, a 90- page declaration in support of his opposition, a 461-page statement of disputed and undisputed facts, and three volumes of exhibits

totaling approximately 1,500 pages. A first-year law student is taught that a filing in support of or in opposition to any motion should be tailored to achieve the paramount goal of assisting the Court in rendering its decision. Plaintiff's filing does the opposite. It is an abuse of the litigation process.

Doc. 89 at 1. After explaining that "Plaintiff's well-documented proclivity in this case to engage in obstructionist litigation tactics at the expense of the Court, opposing counsel, and even his own attorneys will be tolerated no longer," the Court warned Plaintiff that "from the date of this Order forward, Plaintiff will be personally fined and sanctioned every time the Court determines that he has abused the litigation process-regardless of whether he is represented by counselor is proceeding *pro se.*" Id. at 2-3. In a later

order, the Court struck from the record a lengthy document filed by Plaintiff, explaining that "[s]uch a filing, particularly in light of previous warnings to plaintiff, is an abuse of the litigation process and a waste of the Court's time." Doc. 95 at 1. The parties were then informed that "the Court will postpone its consideration of sanctions against [Plaintiff] ... until after defendants' motion for summary judgment has been resolved." Id. at 3. Still later, the Court granted Defendants' summary judgment motion, noting that Plaintiff's claims to damages defied all credulity, making sense "only when viewed in the context of his open threats to achieve 'Christie's unconditional surrender.' " Biester Decl., Ex. 14 at 79. In conclusion, the Court explained that-in its view-Plaintiff's "unsupported, unmeritorious claims ... were initiated in bad faith with the intent to subject

[Defendants] to 'the worst and most costly' litigation in [Defendants'] experience." Doc. 115 at 24.

II.

As correctly noted by Defendants, federal courts possess an inherent power to sanction bad faith litigants. Chambers v. NASCO Inc., 501 U.S. 32,45-46 (1991) (explaining that courts may sanction and require payment of attorney's fees when "a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons"). Federal courts may also impose sanctions pursuant to 28 U.S.C. § 1927, which provides that:

> Any attorney or other person admitted to conduct cases in any court of the United States .. who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

Here, the record amply demonstrates that Plaintiff first initiated, then prosecuted this lawsuit in bad faith for the purpose of harassing Defendants. His egregious behavior, which unreasonably and vexatiously multiplied these proceedings, clearly warrants the imposition of sanctions under section 1927 as well as under the Court's inherent authority. As a sanction, Defendants have requested that Plaintiff be ordered to pay their reasonable attorney's fees "in an amount to be demonstrated by defendants and determined by the Court." Doc. 121 at 22. The Court finds such request appropriate.

Accordingly, it is ORDERED:

1. Defendants' Motion for Attorney's Fees (doc.

121) is GRANTED.

2. The Clerk shall refer the matter to a magistrate judge of this Court for a report and recommendation as to the amount of fees to be awarded Defendants.

DONE AND ORDERED this 14th day of March 2007

/s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV,
Plaintiff,

v. Civil Action No. 97-578 (WHS)(AK)

CHRISTIE'S INTERNATIONAL PLC, *et al.*,
Defendants.

NOTICE TO THE PARTIES

United States District Judge William H. Stafford of the Northern District of Florida has recently informed the Court that he will be retaining jurisdiction over this case. Therefore this Court will issue its forthcoming Report and Recommendation on the calculation of attorneys' fees to Judge Stafford, and not to United States District Judge Paul Friedman as previously indicated.
Dated: January 4, 2008

/s/_____
ALLAN KAY
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV,
Plaintiff

v. Civil Action No. 97cv578 (WHS)(AK)

CHRISTIE'S INTERNATIONAL PLC, et al.,
Defendants

REPORT AND RECOMMENDATION

States District Judge William H. Stafford of the Northern District of Florida, sitting by designation in this case, referred this matter to the undersigned pursuant to Local Civil Rule 72.3(a) for a determination of the amount of attorney's fees to be awarded to Defendants. *(See* Order [136] dated 3/14/07.) After considering the submissions of the parties and the argument presented at the hearing on December 18, 2007, the undersigned issues the following Report and Recommendation.

I. BACKGROUND[1]

This litigation began on March 21, 1997 when Plaintiff Robert Fastov ("Fastov") filed a Complaint [1] against Defendants Christie's International PLC,

[1] For a more detailed recitation of the factual history of this case, see Judge Stafford's Order Granting Defendants' Motion for Summary Judgment [115], dated February 22, 2006.

Christie Manson & Woods, Ltd., and Christie's Inc (collectively "Christie's") alleging negligent misrepresentation, breach of contract, negligent and reckless conduct, intentional infliction of emotional distress, and unfair

trade practices. These claims arose from Fastov's unsuccessful attempt to sell a painting through Christie's, a London-based fine art auctioneer. On February 22, 2006, Judge Stafford "found that Fastov's claims are not only untimely but also unmeritorious" and accordingly granted Defendants' Motion for Summary Judgment. (Order Granting Def's Mot. Summ. J. [115] at 24-25.)

Christie's subsequently filed a Motion for Attorney's Fees pursuant to 28 US.C. § 1927 and the Court's inherent power to impose sanctions. *(See* Mot. for Att'y Fees [121].) Christie's argued that Fastov instituted his suit in bad faith and engaged in vexatious tactics throughout the litigation, and therefore should be ordered to pay Christie's attorney's fees and expenses as a sanction. *(Id.)* Judge Stafford granted Christie's Motion, finding that "the record amply demonstrates that Plaintiff first initiated, then prosecuted this lawsuit in bad faith for the purpose of harassing Defendants. His egregious behavior, which unreasonably and vexatiously multiplied these proceedings, clearly warrants the imposition of sanctions under section 1927 as well as under the Court's inherent authority." (Order Granting Def.'s Mot. for Att'y Fees [136] at 5.)

In his Order, Judge Stafford pointed to several aspects of Fastov's conduct that supported an award of sanctions. First, after learning that Christie's

would not auction his painting, Fastov sent Christie's "a 79-page, single-spaced typewritten letter (with hundreds of pages of attachments), threatening legal action." *(Id.* at 2.) Second, Fastov filed numerous lengthy pleadings during the pendency of the litigation, including a 225-page complaint and an opposition to Christie's Motion for Summary Judgment that was 59-pages long and included "a 90-page declaration in support of his opposition, a 461-page statement of disputed and undisputed facts, and three volumes of exhibits totaling approximately 1,500 pages." *(Id.* at 3

(citing [89] at 1).) Finally, in June 2000 United States District Judge Paul L. Friedman, who at the time presided over the case, put Fastov on notice that his behavior amounted to "an abuse of the litigation process" and that Fastov would "be personally fined and sanctioned every time the Court determines that he has abused the litigation process - regardless of whether he is represented by counselor is proceeding *pro se.*" *(Id.* at 3 (citing [89] at 1-3).)

Having found that Christie's was entitled to "reasonable attorney's fees," Judge Stafford referred the matter to a magistrate judge "for a report and recommendation as to the amount of fees to be awarded to Defendants" *(Id.* at 5 .) After the matter was referred to the undersigned, the parties submitted additional briefs regarding the calculation of attorney's fees and presented argument at a hearing on December 18, 2007.[2] Christie's seeks

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[2] The Supreme Court has held that attorney's fees should not be assessed "without fair notice and an opportunity for

$630,043.32, representing $564,102.86 in fees and $66,030.46 in expenses that Christie's incurred to defend this action from the date of Fastov's Complaint until the end of summary judgment briefing. (Decl. of Michael E. Salzman [138] ¶ 3.) Fastov contends that Christie's is not entitled to any fees or expenses.[3] (Oppn. to Decl. of Michael E. Salzman [139] at 1.)

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a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980.)

[3] Throughout his briefs and his argument at the December 18 hearing, Fastov attempted to persuade the undersigned that he did not act in bad faith or engage in vexatious litigation tactics and therefore should not be sanctioned. *(See, e.g.,* Opp'n to Decl. of Michael E. Salzman (139) at 1-2.) Fastov also argues that Judge Stafford improperly granted Defendants' Motion for Summary Judgment. *(See, e.g.,* Fastov's Supplementation of His Testimony and Argument [144] at 1-2.) This matter was referred to the undersigned for a very narrow purpose, namely calculating the amount of attorney's fees to which Christie's is entitled. Judge Stafford, acting under 28 U.S.C. § 1927 and his inherent authority to sanction litigants, assessed the facts of this litigation and Fastov's conduct therein and decided to grant Christies' Motion for Attorney's Fees. The undersigned is without jurisdiction to overrule Judge Stafford's decision to award attorney's fees and will not revisit the issue of whether Fastov acted in bad faith or engaged in vexatious litigation tactics. The undersigned is similarly without jurisdiction to reconsider Judge Stafford's decision to grant Christies Motion for Summary Judgment. Accordingly, the only arguments that the undersigned considered in formulating its Report and Recommendation are *those that relate to the reasonableness* of Christie's fee and expense request and other factors that a court may consider in calculating attorney's fees .

II. DISCUSSION

Federal courts have both statutory and inherent power to assess attorney's fees against a . party who has acted in bad faith or engaged in vexatious litigation tactics. 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Additionally, a court has inherent power to "assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. '" *Chambers v. NASCO, Inc.,* 501 U.S. 32, 45-46 (1991) (quoting *Alyeska Pipeline Servo Co. v. Wilderness Soc'y,* 421 U.S. 240, 258-59 (1975). Sanctions for bad faith and vexatious tactics are an exception to the "American Rule," which requires that each party bear its own costs of litigation. *Chambers,* 501 U.S. at 45.

A. Standards for Calculating Attorney's Fees

Christie's seeks $630,043.32, which represents the total amount of attorney's fees and expenses that they incurred from the time Fastov filed his Complaint until the end of summary judgment briefing. (Decl. of Michael E. Salzman [138] ¶ 3.) Section 1927 only provides for *excess* costs caused by an attorney's "vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation." *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 756 n.3 (1980) (citing *Monk v. Roadway Express, Inc.,* 599 F2d. 1378, 1383 (5th Cir. 1979). Moreover, the "excess costs" that a party

may recover under § 1927 are limited to the

types of costs enumerated in 28 U.S.C. § 1920.[4] *Roadway Express*, 447 U.S. at 757. However, if a court finds that a party has acted in bad faith, it may, pursuant to its inherent powers, order that party to reimburse his opponent for the full cost of defending the action. *John Akridge Co. v. Travelers Cos.*, 944 F. Supp. 33, 34 (D.D.C. 1996). *See also Chambers*, 501 U.S. at 55 (holding "that the District Court acted within its discretion in assessing as a sanction for Chambers' bad-faith conduct the entire amount of NASCO's attorney's fees"). In this case, Judge Stafford explicitly found that Fastov "first initiated, then prosecuted this lawsuit in bad faith for the purpose of harassing Defendants." (Order Granting Def.'s Mot. for Att'y Fees [136] at 5.) Therefore the undersigned recommends that the trial court apply the standard for calculating attorney's fees set forth in *John Akridge* and *Chambers* and not limit the award to the excess

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[4] Section 1920 lists six categories of costs that are taxable by the court:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses.

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

costs caused by Fastov's vexatious conduct.

B. Reasonableness of Christie's Fee and Expense Request

Once a court determines that sanctions are appropriate under § 1927 and/or its inherent power, it must determine whether the fees and expenses requested are reasonable. *Salvin* v. *Am.Nat. Ins. Co.,* No. 2:06-cv-264, 2007 WL 1097891, at *5, 10 (E.D. Va. Apr. 11, 2007). While

the trial court is empowered to exercise its discretion in determining the fee amount, the fee applicant "still bears the burden of establishing all elements of the requested fee award, including entitlement to an award, the documentation of appropriate hours and justifying the reasonableness of rates." *Blum* v, *Stenson,* 465 U.S. 886, 896 n.1 (1984). The party seeking attorney's fees may establish the reasonable hourly rate by demonstrating "the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community." *Covington v. D.C.,* 57 F.3d 1101, 1107 (D.C. Cir. 1995). In most cases, the court need not engage in rate-making determinations; rather, "the firms' established billing rates will provide fair compensation." *Allen v. Utley,* 129 F.R.D. 1, 7 (D.C. Cir. 1990). A reasonable amount of fees, known as the "lodestar" amount, is calculated by multiplying the court-determined reasonable number of hours spent on the litigation by a reasonably hourly rate for the attorneys involved. *Id.*

In support of their application for attorney's fees and costs, Christie's submitted a Declaration from Michael Salzman, one of Christie's attorneys and a partner at Hughes Hubbard and Reed LLP ("Hughes

Hubbard"). *(See* Decl. of Michael E. Salzman [138].) The Declaration and its accompanying Exhibits set forth the education, experience and hourly rates of each member of the legal team[5] and the fees and costs that are included in Christie's request. *(Id.* at ¶¶ 29-44; Ex. A [138-2J (Hourly Rate and Fee Chart); Ex. B [138-3J (Invoices); Ex. C. [138-4] (Disbursements Chart).) Exhibit A contains the hourly rates and hours expended, and the

resulting lodestar figures, for the four lead attorneys, fourteen other attorneys, and sixteen legal assistants who worked on this case. Exhibit B, a compilation of monthly invoices that Hughes Hubbard sent Christie's, provides a detailed accounting of the number of hours that each attorney spent on various activities in the Fastov litigation.[6] Exhibit C lists the various expenses Hughes Hubbard incurred in litigating this case. Overall, Christie's is seeking $564,012.86 in attorney's fees and $66,030.46 in expenses, for a

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[5] As to the hourly rate of each attorney and legal assistant listed in Exhibit A, Mr. Salzman states that these rates reflect a "discounted rate from the standard rates generally charged to and paid by clients. Hughes Hubbard applies a 5% discount to the fees billed by each partner working on Christie's matters, and a 10% discount to fees of each counsel, special counsel, associate and legal assistant working on Christie's matters." (Decl. of Michael E. Salzman ¶ 39.)

[6] Christie's struck several entries from the August 1997, September 1998 and June 1999 invoices, and excluded the corresponding fees, in an effort to ensure that the "fee request does not include hours that were not necessary in defending this action or should not otherwise be chargeable to Fastov." (Decl. of Michael E. Salzman ¶ 37.)

total of $630,043.32. (Decl. of Michael E. Salzman ¶ 36.)

1. *The hours expended by Christie's counsel were reasonable.*

After reviewing the billing records in Exhibit B and considering the arguments of the parties, the undersigned finds that Christie's has met its burden of establishing that the number of hours it expended in defending this litigation was reasonable. In his Declaration, Mr. Salzman states that it is his "professional opinion that all of the work reflected in Exhibit B ... was reasonably necessary to properly defend this action" (*Id.* 38), and Fastov has offered little, either in his argument at the hearing or in his flurry of pleadings, to counter this assertion. In his voluminous Memorandum in Opposition to the Declaration of Michael E. Salzman, for example, Fastov devotes only one footnote to discussing the reasonableness of two of the billing entries.[7] (Opp'n to Decl. of Michael E. Salzman at 42 n.86.) He first argues that Christie's counsel could

not justify expending time on August 21, 2000 preparing their response to Fastov's motion to file a

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[7] During the hearing, and in the Declaration that he submitted in support of his arguments at the hearing, Fastov actually suggests that Christie's counsel should have spent *more time* defending this action. For example, he points to a lack of billing entries in the summer of 1997 regarding five letters that Fastov sent to Christie's officials as evidence that they did not read those letters. (Pl's Ex. 1 to 12/18/07 Hrg. ("Pl.'s Ex. 1") at 58-59.) that he believes Christie's counsel did not pay enough attention to this litigation undercuts any claim he may have that the hours they did spend on this case were unreasonable.

surreply because Christie's response is dated August 18, 2000. *(Id.)* As Christie's explains, however, the response brief - although dated August 19 - was filed on August 21, and Christie's attorneys spent a total of two hours on August 21 attending to and finalizing the brief. (Def.' s Reply [140] at 2-3.) Fastov also contests billing entries on June 28, 2000 for time that Christie's attorneys spent preparing their response to Fastov's Opposition to Defendants' Motion for Summary Judgment because Judge Friedman struck Fastov's opposition on June 27, 2000. (Opp'n to Decl. of Michael E. Salzman at 42-43 n.86.) Again, Christie's adequately justifies this work by stating that the attorneys did not become aware of Judge Friedman's Order until June 29, 2000. (Def.'s Reply at 3.)

2. *The hourly rates set forth in Exhibits A and B are reasonable.*

The undersigned also finds that hourly rates at issue in this case are reasonable in light of the factors set forth in *Covington,* including the attorneys' billing practices and their experience and reputation. For example, Michael Salzman, the lead attorney on this case, had almost twenty years of experience at the time Fastov filed his complaint, has represented Christie's on other art related matters since 1995, and is a member of the Art Law Committee of the Association of the Bar of the City of New York. (Decl. of Michael E. Salzman ¶¶ 29-31.) As discussed above, a firm's billing rates are a sound basis for attorney's fee awards. *Allen,* 129 F.R.D. at 7. Therefore the fact that Hughes Hubbard charged Christie's a discounted rate of up to *10%* of the standard fees charged to clients (Decl. of Michael E. Salzman' 39) further supports the reasonableness of

the hourly rates set forth in Exhibit A. Finally, the undersigned notes that Fastov has not

challenged the reasonableness of the hourly rates charged by Hughes Hubbard for the services of its attorneys and legal assistants.

3. *The expenses claimed by Christie's in Exhibit C are reasonable.*

The undersigned further finds that the amount and type of expenses claimed by Christie's is reasonable. In his Declaration, Mr. Salzman asserts that, in his professional opinion, "all of these services were reasonably necessary to properly defend this action." (Decl. of Michael E. Salzman ~ 42. Again, Fastov has failed to put forth any evidence or argument that these expenses were not reasonably incurred.

C. Fastov's Ability to Pay Christie's Attorney's Fees

In setting the final fee award, the trial court should consider the sanctioned party's assets and his ability to pay the sanction. *Kapco Mfg. Co. v. C & O Enters., Inc.*, 886 F.2d 1485, 1496 (7th Cir, 1989). As one court has stated: "[Sanctions must never be hollow gestures; their bite must be real. For the bite to be real, it has to be a sum that the person might actually pay. A sanction which a party clearly cannot pay does not vindicate the court's authority because it neither punishes nor deters." *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2002). Because inability to pay is treated like an affirmative defense, the burden is on the party being sanctioned to put forth evidence of his financial status. *Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1160 (10th Cir. 1991)

(discussing sanctions under Federal Rule of Civil Procedure 11).

Fastov argues that he is financially unable to pay Christie's the $630,043.32 in sanctions

that they seek.[8] Fastov asserts that because of his age and health problems, he is unable to work, and that he is currently "living off his investments," which generate approximately $109,000 per year. (Opp'n to Decl. of Michael E. Salzman at 29; Pl.'s Ex. 1 at 15.) Additionally, he states that he recently borrowed $200,000 to make payments under his divorce settlement agreement and that he paid approximately $35,000 in the past year to support his unemployed daughter. (Pl.'s Ex. 1 at 15-16.) Fastov claims that if he is ordered to pay Christie's the full amount of their claimed fees and expenses, he "would have an income that approaches the poverty level as [his] health costs and other costs problems with old age accelerate." *(Id.* at 17.) Christie's did not present any contradictory evidence regarding Fastov's net worth.

The undersigned is sensitive to Fastov's financial situation and the concern that sanctions would be a

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[8] Fastov also argues "that Christie's is an extremely financial powerful corporation," and therefore is not entitled to attorney's fees. (Opp'n to Decl. of Michael E. Salzman at 29. *See also* Pl.'s Ex. 1 to 12118/07 Hrg. at 20-23.) However, the relative financial position of the sanctioned party and the party seeing the attorney fees is "wholly irrelevant" to the sanctioned party's ability to pay. *Dodd,* 935 F.2d at 1160. Therefore the undersigned did not consider the relative financial status of the parties in assessing the amount of fees and expenses Fastov should be ordered to pay.

hollow gesture if he is unable to pay. At the same time, the sanction award must be significant enough to deter Fastov from filing future frivolous lawsuits and engaging in vexatious litigation tactics. Furthermore, even if an offending party proves that he is "totally impecunious, the court may impose modest sanctions" as a deterrent. *White v. General Motors Corp., 908* F.2d 675, 685 (10th Cir. 1990) (discussing sanctions under Federal Rule of Civil Procedure 11.) Therefore Fastov's inability to pay the full magnitude of fees and costs that Christie's seeks is grounds for reducing the amount of fees and costs that they reasonably incurred rather than denying them outright.

III. CONCLUSION

Because Fastov instituted his suit against Christie's in bad faith and because the undersigned finds that Christie's reasonably incurred $564,012.86 in attorney's fees and $66,030.46 in expenses to defend against Fastov's claims, the trial court may exercise its inherent authority and order Fastov to pay $630,043.32 in sanctions. However, after giving serious consideration to the purposes underlying sanctions in this context, as well as Fastov's financial situation, the undersigned recommends that the trial court order Fastov to pay Christie's attorney's fees and expenses in the amount of $110,000.

IV. REVIEW BY THE DISTRICT COURT

The parties are hereby advised that under the provisions of Local Rule 72.3 (b) of the United States District Court for the District of Columbia, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this

Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made, and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn,* 474 U.S. 140 (1985). If this Report and Recommendation is served on the parties by mail, calculation of the time period for filing written objections is as follows: 10 business days (excluding weekends and holidays) plus three calendar days (including weekends and holidays). *See CNPq·Conselho Nacional De Desenvolvimento Cientifico E Technologico v. Inter·Trade,*

Inc .. 50 F.3d 56, 58 (D.C. Cir. 1995) (per curium).

Dated: January 24 , 2008

/s/_____
ALAN KAY
UNITED STATES
MAGISTRATE
JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV,
Plaintiff

v. Civil Action No. 97cv0578 (PLF)

CHRISTIE'S INTERNATIONAL PLC, CHRISTIE MANSON & WOODS, LTD and CHRISTIE'S INC.,
Defendants

ORDER AWARDING ATTORNEYS' FEES AND EXPENSES TO DEFENDANTS

Before the court is the magistrate judge's report and recommendation docketed January 24, 2008. Doc. 148. The magistrate judge recommends that the plaintiff, Robert S. Fastov ("Fastov"), be ordered to pay to the defendants attorneys' fees and expenses of $110,000. The parties have responded (docs. 149, 151-154) to the magistrate judge's report and recommendation, and Fastov has requested (doc. 155) a hearing.

In a previous order (doc. 136), this court granted the defendants' motion for attorneys' fees and

expenses. The court explained the reasons for its order as follows:

> [T]he claims in this case arose when Plaintiff, an art dealer, unsuccessfully attempted to sell a painting through Christie, Manson & Woods, Ltd. ("CMW"), a London-based art auctioneer. After learning that CMW declined to auction his painting, Plaintiff sent CMW a 79-page, single-spaced typewritten letter (with hundreds of pages of attachments), threatening legal action. In particular, Plaintiff explained that, unless CMW agreed to his settlement proposal ($168K), he was prepared to file
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> a lawsuit for compensatory damages in excess of $265,000 and "punitive damages in an amount to be determined, but considerably in excess of $1,000,000." Biester Decl., Ex. 14 at 1. He also suggested that "the cash outlays that Christie's will, to a legal certainty, have to make (and will not recover, even if Christie's wins) to defend the litigation will be approximately $221.3K (very conservatively understated) or (more realistically) well in excess of $300K." Id. at 3 (emphasis in original). Characterizing his statements not as threats but as simple statements of business fact, Plaintiff gave CMW three weeks in which to respond to his letter. Plaintiff went on to state:
>
> > [I]f you decide for tactical purposes to delay your response beyond my three week deadline, Christie's costs of settlement will increase appreciably. If you decide to wait to see if I actually file the suit before approaching me to discuss settlement, you will find that the chances of achieving settlement are virtually nil, unless

> Christie's is prepared to reimburse me for all of my costs to date of settlement and pay all of my compensatory damages, which will be well in excess of $265K, and an extremely high percentage of the amount of punitive damages prayed for in the complaint, which shall be in the millions of dollars.

Id. at 5.

In concluding his lengthy letter, Plaintiff wrote:

> Do not bet against my inclination, will, ability, experience, and tenacity to file and successfully maintain F v. C through to its successful conclusion. It will be the worst and most costly conclusion and bet of your life. The settlement proposals and the purposes of this letter are inherently pacific in nature. If you and Christie's force me to go to war, those who have litigated for, with, and against me will tell you that I am extremely tough, intelligent, and tenacious. I give no quarter and ask none, and above all, I will take any and all actions, both within and without the courtroom, that do not violate the legal rules of professional conduct, necessary to achieve Christie's unconditional surrender.

Id. at 79.

When his threats proved unavailing, Plaintiff filed a 225-page complaint

against CMW and two related entities (collectively, "Defendants") in this Court. During the course of the litigation, the Court more than once admonished Plaintiff for abusing the litigation process. For example, the Court at one time entered an order stating:

> In response to defendants' motion for summary

> judgment, plaintiff has attempted to file a 59-page opposition, a 90- page declaration in support of his opposition, a 461-page statement of disputed and undisputed facts, and three volumes of exhibits totaling approximately 1,500 pages. A first-year law student is taught that a filing in support of or in opposition to any motion should be tailored to achieve the paramount goal of assisting the Court in rendering its decision. Plaintiff's filing does the opposite. It is an abuse of the litigation process.

Doc. 89 at 1. After explaining that "Plaintiff's well-documented proclivity in this case to engage in obstructionist litigation tactics at the expense of the Court, opposing counsel, and even his own attorneys will be tolerated no longer," the Court warned Plaintiff that "from the date of this Order forward, Plaintiff will be personally fined and sanctioned every time the Court determines that he has abused the litigation process--regardless of whether he is represented by counselor is proceeding *pro* se." Id. at 2-3. In a later order, the Court struck from the record a lengthy document filed by Plaintiff, explaining that "[s]uch a filing, particularly in light of previous warnings to plaintiff, is an abuse of the litigation process and a waste of the Court's time." Doc. 95 at 1. The parties were then informed that "the Court will postpone its consideration of sanctions against [Plaintiff] ... until after defendants' motion for summary judgment has been resolved." Id. at 3. Still later, the Court granted Defendants' summary judgment motion, noting that Plaintiff's claims to damages defied all credulity, making sense "only when viewed in the context of his open threats to , achieve 'Christie's unconditional surrender.'"

Biester Decl., Ex. 14 at 79. In conclusion, the Court explained that in its view Plaintiff's "unsupported, unmeritorious claims ... were initiated in bad faith with the intent to subject [Defendants] to 'the worst and most costly' litigation in [Defendants'] experience." Doc. 115 at 24. .... Here, the record amply demonstrates that Plaintiff first initiated, then prosecuted this lawsuit in bad faith for the purpose of harassing Defendants. His egregious behavior, which unreasonably and vexatiously

multiplied these proceedings, clearly warrants the imposition of sanctions under section 1927 as well as under the Court's inherent authority. As a sanction, Defendants have requested that Plaintiff be ordered to pay their reasonable attorney's fees "in an amount to be demonstrated by defendants and determined by the Court." Doc. 121 at 22. The Court finds such request appropriate.

After this court granted the defendants' motion for fees and expenses, the matter was referred to the magistrate judge for a report and recommendation as to the amount of fees and expenses to be awarded. After reviewing the submissions of the parties and hearing argument on December 18, 2007, the magistrate judge determined that the defendants incurred reasonable attorneys' fees and expenses totaling $630,043.32. He specifically found that such fees were based on (1) reasonable hourly rates for both attorneys and legal assistants; (2) a reasonable number of hours expended in defending the litigation; and (3) reasonable (both in type and amount) expenses.

At the hearing before the magistrate judge, Fastov made unsubstantiated statements about his

ability to pay the fees and expenses found to be reasonable. He also submitted a declaration in which he made various assertions about his financial status. He did not submit tax returns, brokerage statements, bank records, or any other documents to corroborate his assertions. The magistrate judge was nonetheless "sensitive" to Fastov's financial situation and to "the concern that sanctions would be a hollow gesture if he is unable to pay." The magistrate judge accordingly recommended that the court order Fastov to pay $110,000 in fees and expenses, less than one-fifth of the amount reasonably expended by the defendants.

After the magistrate judge's report and recommendation was entered, the

defendants filed "conditional" objections. The defendants represented that they "would be prepared to acquiesce in [the magistrate judge's] exercise of discretion to award it only $110,000, and not the full amount which Christie's actually incurred and which he found to be reasonable-but only if Plaintiff likewise accepts [the magistrate judge's] Report and Recommendation and does not seek to have it reduced." The defendants submitted, however, that a just sanction for Fastov's misconduct should be no less than $300,000.

Fastov soon after filed 45 pages of objections, much of the document consisting of 77 single-spaced, often lengthy footnotes. Attached to his objections are hundreds of pages of exhibits. Fastov thus continues to engage in the very conduct that, in part, has resulted in sanctions being awarded against him.

He also submitted a declaration in which he made

various assertions about his financial status. He did not submit tax returns, brokerage statements, bank records, or any other documents to corroborate his assertions. The magistrate judge was nonetheless "sensitive" to Fastov's financial situation and to "the concern that sanctions would be a hollow gesture if he is unable to pay." Like the magistrate judge, this court is not unmindful that Fastov has *said* that his ability to pay is limited. He has not, however, submitted corroborating evidence to substantiate his financial status. Fastov's egregious conduct, moreover, has caused the defendants to spend···now clearly unnecessarily so···in excess of $600,000 defending this baseless lawsuit. Fastov's prolixity in verbiage and meanness in actions have wasted the time and energy of at least three federal judicial officers, resources that could have been utilized in the dispatch of legitimate court business. No court would have long tolerated such conduct on the part of a bona fide *pro* se party; and certainly any judge would have been justified in referring a lawyer who so conducted himself to the disciplinary process of the cognizant bar association. This case presents the worst of both.

Fastov himself does not question the reasonableness of the defendants' claim for fees and costs. Instead, he seeks to avoid responsibility by now claiming a reduced income. Yet, it is clear that he has defiantly shunned every opportunity to mitigate his loss. The magistrate judge's compassion, and the defendants' offer to accept a reduced amount have been met by Fastov's continued strident rejection of reason. Indeed, his contempt for the entire litigation process in this lawsuit, initiated by

him and vexatiously still maintained by him, militates against financially punishing the defendants further.

As his own words have clearly established, the plaintiff initiated this lawsuit with the bad faith intent to subject the defendants to "the worst and most costly" litigation in the defendants' experience. Now Fastov must pay for vexatiously pursuing frivolous claims, for prosecuting his case in bad faith, for multiplying the proceedings unnecessarily, and for generally engaging in conduct that degrades the entire judicial system.

Here, there is no public wrong to be righted, no class of victims seeking redress, no constitutional liberty being vindicated. Instead, a greedy individual, with the advantage of a legal education and a claimed litigation expertise, has initiated and maintained this lawsuit, which anyone with a modicum of common sense would have soon realized was without merit. Nevertheless, with myopic vengeance, Fastov has pursued the defendants, using and abusing them and the judicial process. Fastov could have stopped this senseless bleeding at any time, but after being publicly warned and chastised for his outrageous conduct, has persisted in inflicting more wounds.

Such an individual, such a party, such a lawyer has forfeited his entitlement to minimize his exposure to paying for the harm that he alone has caused. Under these unusual circumstances, the court finds that the defendants are entitled to be made whole for the entirety of their costs and fees expended in defending this malicious lawsuit.

Accordingly, it is ORDERED:

1.The magistrate judge's report and recommendation (doc. 148) is ADOPTED-except as to the amount to be awarded to the defendants-and is incorporated by reference into this order.

2. Fastov shall pay to the defendants the total amount of $630,043.32, including $66,030.46 in expenses and $564,012.86 in attorneys' fees, as a sanction for his bad faith, vexatious, and oppressive conduct in this case.

3. Fastov's request for a hearing (doc. 155) is DENIED.

4. The clerk of the court shall enter judgment accordingly.

5. No motion or petition for rehearing will be entertained.

DONE AND ORDERED this 25th day of April, 2008

/s/William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF FLORIDA SITTING BY DESIGNATION

III. FILINGS BY RESPONDENTS, CHRISTIE'S

Letter Of Respondents' Counsel To Judge Stafford That Was Filed On February 14, 2006

Hughes Hubbard &Reed LLP

One Battery Park *Plaza*
New York, New York 10004-1482
Telephone: 212-837-6000
Fax: 212-422-4726

Michael E. Salzman
Telephone: 212-837-6833
Fax: 212-299-6833
E-mail: salzman@hugheshubbard.com

February 7. 2006

BY FEDERAL EXPRESS

Hon. William H. Stafford, Jr.
United States District Court for the Northern District of Florida
111 North Adams Street
Tallahassee, FL 32301

Re: *Robert* S. *Fastov* v. *Christie's International* C.A. No. 97- 578 (D.D.C.)

Dear Judge Stafford:

We represent the defendants in this action, in which defendants' motion for summary Judgment is *sub judice* before Your Honor.

Enclosed please find the January 31, 2006 decision of the United States District Court for the District of Maryland in *Robert* S. *Fastov* v. *Palisades Swimming Pool Ass 'n,* C.A. No. AW-05-1760, dismissing the complaint and sanctioning plaintiff.

While the subject matter of that case is different from ours, we bring it to the Court's attention because there is a striking similarity between them. In both cases, plaintiff Robert S. Fastov ("Fastov") made clear at the outset that he intended to prosecute his lawsuits in such a way that his adversaries would be put to enormous expense even if his claims had no merit.

In *Palisades,* Fastov began with 220 single-spaced pages of letters, warning:

> Under the 'American system' dealing with attorney's fees, your attorney's fees and expert fees ARE NOT recoverable by you from me, even if you were to prevail in the litigation (which will not occur)."

And he followed with this advice,

"No responsible, competent CEO of a corporation would expose the corporation or its Board Members to this kind of extended a~~ costly litigation .... "

Slip op. at 3-5. When his demands were not complied with, Fastov filed a complaint that was 240 pages in length. *Id.* at 6.

In the case before Your Honor, Fastov wrote a 78-page, single-spaced letter to Marc Poltimore of Christie's (accompanied by more than 200 pages of attachments), in which he warned that, if Christie's did not accede to his demand, he would commence litigation in which,

"the cash outlays that Christie's will, to a legal certainty, have to make (and will not recover, even if Christie's wins) to defend the litigation will be approximately $221.3K (very conservatively understated) or (more realistically) well in excess of $300K .... "

He then advised,

"The foregoing information should cause any reasonable, prudent businessman to allocate the requisite time and energy to read, evaluate, and respond to my request in a timely manner." *

When Christie's did not give in to this threat, Fastov proceeded to file a 225-page complaint, and defendants have indeed had to expend hundreds of thousands of dollars in defense costs.

Because this case was recently re-assigned to Your Honor, we bring to your attention two orders previously entered in this action. By Order filed June 27, 2000 (docket #89), Judge Friedman warned Fastov that he was subject to sanctions in this case for any further misconduct. By Order filed August 29, 2000 (docket #95), after further misconduct, Judge Friedman noted Fastov's "tendency to flood the Court and opposing counsel with paper," and ordered that the Court would "postpone its consideration of sanctions against Mr. Fastov ... until after defendants' motion for summary judgment has been resolved."

/s/Michael E. Salzman

cc: Robert S. Fastov, Esq. (by Federal Express and US Mail)

Clerk, United States District Court for the District of Columbia

*Fastov's letter to Poltimore is Exhibit 14 to the Declaration of David Biester in Support of Defendants Christie's International PLC, Christie, Manson & Woods Ltd. And Christie's Inc.'s Motion for Summary Judgment. The quotation comes from page 3.

Notice Of Filing Supplemental Authority By Respondents' Counsel, Filed On February 14, 2006

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV,
Plaintiff,
v.

CHRISTIE' S INTERNATIONAL PLC, CHRISTIE, MANSON & WOODS, LTD., and CHRISTIE'S INC.,
Defendants.

NOTICE OF FILING SUPPLEMENTAL AUTHORITY

Defendants Christie's International PLC, Christie, Manson & Woods Ltd. and Christie's Inc. (collectively, "Christie's" or the "Defendants") submit this notice of filing the attached decision, *Robert* S. *Fastov* v. *Palisades Swimming Pool Ass 'n, Inc.,* C.A. No. AW-05-. Jan. 31, 2006) (dismissing complaint and sanctioning plaintiff), as supplemental authority in further support of Defendants' motion for summary judgment.

While the subject matter of the *Fastov* v. *Palisades* case is different from the instant action, there is a striking similarity between the two cases. In both cases, plaintiff Robert S. Fastov ("Fastov") made clear at the outset that he intended to prosecute his lawsuits in such a way that his adversaries would be put to enormous expense even if his claims had no merit.

In *Palisades,* Fastov began with 220 single-spaced pages of letters, warning:

"Under the 'American system' dealing with attorney's fees, your attorney's fees and expert fees ARE NOT recoverable by you from me, even if you were to prevail in the litigation (which will not occur)."

And he followed with this advice,

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"No responsible, competent CEO of a corporation would expose the corporation or its Board Members to this kind of extended and costly litigation .... "

Fastov v. Palisades, C.A. No. AW-05-1760, slip op. at 3-5 (emphasis in original). When his demands were not complied with, Fastov filed a complaint that was 240 pages in length. *Id.* at 6.

Similarly, in the instant action, Fastov wrote a 78-page single-spaced letter to Marc Poltimore of Christie's (accompanied by more than 200 pages of attachments), in which he warned that, if Christie's did not accede to his demand, he would commence litigation in which,

"the cash outlays that Christie's will, to a legal certainty, have to make (and will not recover, even if Christie's wins) to defend the litigation will be approximately $221.3K (very conservatively understated) or (more realistically) well in excess of $300K .... "

He then advised,

"The foregoing information should cause any reasonable, prudent businessman to allocate the requisite time and energy to read, evaluate, and respond to my request in a timely manner."

Ex. 14 to Declaration of David Biester in Support of Defendants Christie's International PLC, Christie, Manson & Woods Ltd. and Christie's Inc.'s Motion for Summary Judgment, at 3. When Christie's did

not give in to this threat, Fastov proceeded to file a 225-page complaint, and Defendants have indeed had to expend hundreds of thousands of dollars in defense costs.

Moreover, two orders previously entered by Judge Friedman in this action have addressed the possibility of sanctions against Fastov. By Order filed June 27, 2000 (docket #89), Judge Friedman warned Fastov that he was subject to sanctions in this case for any further misconduct. By Order filed August 29, 2000 (docket #95), after further misconduct, Judge Friedman noted Fastov's "tendency to flood the Court and opposing counsel with paper," and ordered that the Court would "postpone its consideration of sanctions against Mr. Fastov ... until after defendants' motion for summary judgment has been resolved."

Dated: February 14, 2006

Respectfully submitted,
HUGHES HUBBARD & REED LLP
/s/_____
Aviva L. Wernick, *pro hac vice*
HUGHES HUBBARD & REED LLP
201 S. Biscayne Boulevard, Suite 2500 Miami, FL 33131
Telephone: (305) 358-1666
Facsimile: (305) 371-8759
E-mail: wernick@hugheshubbard.com
-and-
Michael E. Salzman, *pro hac vice*
HUGHES HUBBARD & REED LLP
One Battery Park Plaza

New York, NY 10004
Telephone: (212) 837-6000
Facsimile: (212) 422-4726
E-mail: salzman@hugheshubbard.com
Counsel for Defendants Christie's International PLC, Christie, Manson & Woods, Ltd. and Christie's Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 14th day of February 2006, by U.S. mail upon Robert S. Fastov, 4428 45th Street, NW,
Washington, DC 20016-2053.

/s/
Aviva L. Wernick

Excerpt From Robert S. Fastov v. Palisades Swimming Pool Association, Inc., *et al*, Submitted In Full As An Attachment By Respondents To The Foregoing Notice Filed By Respondents

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

ROBERT S. FASTOV,
Plaintiff,

v. Civil Action No. A W-05-1760

PALISADES SWIMMING
POOL ASSOCIATION, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiff Robert Fastov ("Plaintiff or "Fastov") brings this action *pro se* against Palisades Swimming Pool Association ("Palisades") and many of its board of directors and officers (collectively "Defendants"), alleging that Defendants violated state law, and seeks declaratory judgment, injunctive relief, and monetary damages. Currently pending before the Court is Defendants' Motion to Dismiss or for Summary Judgment [14] and Plaintiffs Motion for Leave to File a Surreply [19]. The Court has reviewed the entire record, as well as the pleadings with respect to the instant motions and has determined that no hearing is necessary.

See Local Rule 105.6 (D. Md. 2004). For the reasons set forth more fully below, the Court will GRANT the motion in part and dismiss this case, as this Court lacks subject matter jurisdiction over the action. Accordingly, the Court will DENY the Motion for Leave to File a Surreply as moot.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Palisades is a private non-profit corporation that operates a recreational pool and tennis facility in Montgomery County, Maryland. Plaintiff, a resident of the District of

Columbia, a retired litigator and art dealer, is a permanent member of Palisades. Although Plaintiff has used Palisades' facilities since 1975, he has had a tumultuous relationship with the officers, directors and employees of Palisades. In Plaintiff s Complaint, he recounts two incidents in which an employee or officer of Palisades confronted Plaintiff concerning his conduct at the Palisades facility. On one occasion, an employee of Palisades discovered Plaintiff smoking a cigarette on Palisades premises and requested that Plaintiff extinguish his cigarette. Plaintiff refused, claiming that the Palisades Rules did not require him to stop smoking.[9] At another point, an official or parent of the Palisades Diving Team complained to the manager of the pool, Eve Silver, that Plaintiff's walking around the main

[9] In particular, Plaintiff opines that the employee adopted an unreasonable interpretation of Rule 6, which states "It is requested that individuals not smoke on Association property, and *no smoking is permitted in the picnic areas.*" Plaintiff interprets this rule to permit smoking in all areas, other than the picnic area. *See* Compl. ¶ 20.

Palisades swimming pool during a diving match distracted the divers. By Plaintiffs own admission, he attempted to confront the individual who made this complaint, demanding to know his "problem with [Plaintiff] walking around the well." After both incidents, directors of Palisades spoke to Plaintiff and expressed that they found his behavior unacceptable.

While Plaintiff denies that he engaged in any other objectionable conduct, Defendants allege that his behavior came to the attention of Palisades Officials on several other occasions. In particular, Defendants have stated that Plaintiff made sexually suggestive comments to at least one female member, leered at female staff and members, was verbally abusive toward Palisades employees, and acted aggressively toward children in the pool who came too close to him. According to Defendants, responding to numerous reports about Plaintiff, the Board decided to

send him a letter, detailing their concerns. In that letter, sent by email on July 13, 2004, the President of Palisades Jeffrey Bryan instructed Plaintiff that the Board would terminate or suspend Plaintiff's Palisades membership unless he complied with the following conditions:

> 1. You will refrain from any abusive language (threatening or profane), physical intimidation or the creation of any hostile airs toward any members of the Palisades membership, including any of our kids, regardless of age. You will comply with any instructions from the staff regarding pool rules, safety and facility regulations. You are not to touch, in any manner, for any reason, anyone other

than one of your own family.

2. You will cease and desist in any behavior that is perceived to be leering, sexually intimidating, or creating a sexually hostile environment which serves to intimidate and frighten our female members and staff. You are not to touch, in any manner, for any reason, anyone other than a member of your own family.

Compl. ¶ 5. Defendants have indicated that they believed that this approach seemed to resolve the problem. Therefore, Defendants took no further action, and at no time did the Palisades Board revoke Plaintiff s membership.

From Plaintiffs perspective, however, the July 13, 2004 letter marked a turning point for his relationship with Palisades. Construing the letter to accuse Plaintiff of assault, battery, sexual perversion, pedophilia and pederasty, Plaintiff wrote the Palisades Board and its officers nine letters, spanning over 220 single-space pages, in which he demanded rescission of the two "orders" and a formal apology. *See* Compl. ¶ 5,53, 59, 60, 61, 62-63, 67-70, 75-77, 79, 83-84, 87, 89; Def. Mtn. To Dismiss, at 4-5. In addition, Plaintiff attempted to conduct "discovery" concerning the allegations and insisted that Palisades identify all the members or employees who complained about his behavior and give him their personal information. He also threatened

litigation several times in these letters. In one letter, Plaintiff wrote to Defendant Bryan:

Given my letter to you of September 13, 2004 and your absurd response of September 9, 2004 to my previous correspondence to you, you have a simple choice. Either you can have such letter that I

propose ... typed up on Palisades Board stationery and sign it; thus, "swallowing" your arrogance ... in effect, admitting to me .. . that you were wrong ... , or, alternatively, you can cause me to file the lawsuit against you.

Even if you defend such lawsuit yourself. . . you will expend hundreds of hours processing the defense thereof through discovery, jury trial and, perhaps, appeal. The many hours that you expend on the defense of the lawsuit could be used by you to produce income for you and your family. If you, however, opt to hire an attorney, who will defend my suit against you (almost certainly, not against Palisades), you will have to pay tens of thousands of your after tax dollars to conduct your defense in this litigation.

Under the "American system" dealing with attorney's fees, your attorney's fees and expert fees ARE NOT recoverable by you from me, even if you were to prevail in the litigation (which will not occur).

Remember that what you will win with either retained counselor acting as your own counsel, will be a piece of paper...that in effect, states that you were right and I was wrong about your determinations concerning me and my conduct .... As I think you are aware, I am, in effect, a retired ... litigator, receive a significant tax free investment income and can devote myself to my lawsuit 24 hours a day.

Compl. ~ 72 (emphasis in original). In yet another letter, Plaintiff reiterated his intent to file a suit,

stating:

At some point, if you do not execute and transmit to me the rescission/apology (attached hereto), I shall bring to the Board's attention that you forced me to approach the Board, and, upon the Board's refusal to give me a fair hearing and to issue the rescission/apology and provide me with compensation, I shall sue

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you, and Board Members and Palisades. ...

> I shall make clear to the Board my view that your refusal to execute the rescission/apology and forcing the Board to deal with this matter and expose Board Members to a lawsuit in their official and personal capacities, .. was a self-centered decision on your part. , , . No responsible, competent CEO of a corporation would expose the corporation or its Board Members to this kind of extended and costly litigation, .. when the only cost to the corporation to avoid this litigation would have been the ego cost to you of having to execute the rescission apology .

Compl. ¶ 79.

IV. FILINGS BY PETITIONER, ROBERT S. FASTOV

Cases In Which The Courts Awarded Attorney's Fees Pursuant To The Courts' Inherent Power Or Authority Decided Post *Chambers v. Nasco, Inc.* 501 U.S. 32 (1991) Through September 30, 2009

On September 30, 2009, petitioner searched the Loislaw legal data base of cases of the Supreme Court, all the Circuit Courts and all the District Courts, utilizing the following two searches: (1) "attorney's fees" /75 $ /250 "inherent authority", which yielded 45 cases to be read and (2) "attorney's fees" /75 $ /250 "inherent power", which yielded 159 cases to be read (204 in total). Petitioner looked at all of the cases that were decided post *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991). The following is a list of cases in which a specific amount of attorney's fees were awarded pursuant to the courts' inherent power or authority, even if another legal authority, e.g. 28 U.S.C. § 1927, was also cited, as an additional source of the court's sanctioning power. Only cases in which a specific amount of attorney's fees awarded were selected, and the award was made against an individual plaintiff, *pro se* plaintiff or defendant or an attorney or expert of such plaintiff or defendant. This list does not include any cases in which a motion for attorney's fees was granted, but no specific amount of fees were awarded.

Listed below are the 22 cases in which such a person was sanctioned for a specific amount of money pursuant to the courts' inherent authority/power from 1991 to September 30, 2009, out of 204 cases that were found in the Loislaw search.

By a factor of approximately six, it is the U.S. court record for such an award, against an individual party or an attorney or expert of such party sanctioned pursuant to the courts' inherent authority/power from *Chambers v. Nasco, Inc.,* 501 U.S. 32.(1991) to September 30, 2009, which was $110,122.65, per *U.S. v. Hurwitz*, CIVIL ACTION H-96-1164; Loislaw 3 (D.S.D.Tex. April 14, 1999). *See* No. 19 below. The aggregate amounts awarded against individuals in the relevant 22 cases was $379,608.37, less than 3/5 of the $630,043.32 awarded against this sole petitioner. 13 of the 22 cases awarded $10,439.50 or less and $65,760.50 was the highest other award. Another *pro se* plaintiff, whose conduct with the courts was far worse than that of petitioner was sanctioned with a $2,000.00 award. *See Balcar v. Bell And Associates, LLC,* Civil Action No. 5:02CV2 (STAMP) Loislaw 15 (N.D.W.Va. April 3, 2003) below..

1. *Zlotnick v. Hubbard*, 1:07-CV-405, (GLS/DRH); Loislaw pp. 43-44 (N.D. N.Y. 8-18-2008)

Fees awarded against individual plaintiff's attorney

"Accordingly, the court awards the Church defendants attorney's fees of $10,000, to be paid by Aretakis."

2. *Erum v. County Of Kauai,* Civ. No. 08-00113 SOM-BMK.; Loislaw p. 6 (D.Hawaii 5-14-2008)

Fees awarded against individual plaintiff

"Under the Court's inherent authority, Plaintiff Theodorico Erum is ordered to pay $13,231.97 in sanctions to Defendants Koloa Markteplace, LLC and Earthworks Pacific, Inc."

3. *Wakefield v. Sears, Roebuck & Co,*. Case No. 05-61152-CIV-Moore/Garber; Loislaw p. 4 (S.D.Fla. 3-11-2008)

Fees awarded against individual plaintiff
"Said defendant is hereby awarded the sum of Twenty Thousand Dollars ($20,000.00) as and for reasonable and necessary attorneys' fees, said sum to be paid to the defendant by the plaintiff."
4. *Van Deelen v. City Of Kansas City,* Case No. 04-989-CV-W-GAF; Loislaw p. 23 (W.D.Mo. July 24, 2006)
Fees awarded against individual plaintiff
"...HEREBY IMPOSES a monetary sanction on Van Deelen in the form of attorney's fees to be paid to the City in the amount of $6,000."
5. *Mendez v. Unum Provident Corporation,* No. C04-01312 JW (HRL); Loislaw p. 3, 4 (N.D.Cal. February 16, 2006)
Fees awarded against plaintiff's expert
"Based on the foregoing, IT IS ORDERED THAT Prater shall pay to defendants their reasonable fees and costs in the amount of $1,787.55...."
6. *The Chosin Few, Inc v. Scott,* Civil No. 1:98cv59, Civil No. 1:99cv267, Civil No. 1:00cv294; Loislaw unpaginated (W.D.N.C. June 24, 2002)
Fees awarded against individual plaintiff
"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendant, the Chosin Few, Inc., have and recover of the Plaintiff, Roger L. French, the sum of TWENTY-THREE THOUSAND SIX HUNDRED TWENTY-TWO DOLLARS AND THIRTY-EIGHT CENTS ($23,622.38) in attorney's fees and expenses...."
7. *Morris v. Lomas And Nettleton Co.*, 825 F. Supp. 979, 981 (D. Kan. 1993)
Fees awarded against individual *pro se* plaintiff
"The defendant is hereby awarded attorney's fees and expenses in the amount of $8,000.00."

8. *Edwardsville Community School District No. 7 v. Gray,* CIVIL NO. 07-801-GPM.; Loislaw p. 2 (S.D.Ill. 8-11-2009)
Fees awarded against individual defendant
"Gray shall pay to Edwardsville CUSD the amount of $2,385.90, plus $262.50 (for 1.5 hours of attorney Knapp's time on August 10, 2009, at the rate of $175/hour), for a total sanction of $2648.40."
9. *Barrey v. Ocwen Loan Servicing,* LLC, No. CV-09-00573-PHX-GMS.; Loislaw p. 5 (D.Ariz. 7-2-2009)
Fees awarded against individual plaintiff's document preparer
"IT IS THEREFORE ORDERED that Ms. Rae Heimer shall pay Bank of America $1,500.00 for its attorneys' fees and $274.00 for its costs incurred in defending this litigation."
10. *Sun v. CM Products, Inc.,* Civil Action No. 5:07-cv-227-JMH.; Loislaw pp. 6-7 (E.D.Ky. 2-25-2009)
Fees awarded against individual plaintiff
"...IT IS ORDERED that Plaintiff shall pay the sum of $1,399.82 to Defendants."
11. *Parker v. Upsher-Smith Laboratories, Inc.,* 3:06-CV-0518-ECR (VPC).; Loislaw p. 13 (D.Nev. 2-18-2009)
Fees awarded against individual plaintiff's counsel
"Pursuant to the court's inherent power and LR IA 4-1, plaintiff's counsel, not the plaintiff, are sanctioned the sum of $4,000.00...."
12. *Herd v. American Security Ins. Co.*, Case No. 06-4284-CV-C-NKL.; Loislaw unpaginated (W.D.Mo. 5-9-2008)
Fees awarded against defendant's attorney
"Attorney Joseph L. Van Ackeren must pay attorney's fees to Plaintiffs in the amount of $4,000.00...."

13. *Wakefield v. Sears, Roebuck & Co.*, Case No. 05-61152-CIV-Moore/Garber.; Loislaw p. 4 (S.D.Fla. 3-11-2008)
Fees awarded against individual plaintiff
"Said defendant is hereby awarded the sum of Twenty Thousand Dollars ($20,000.00) as and for reasonable and necessary attorneys' fees, said sum to be paid to the defendant by the plaintiff."
14. *Baker v. Urban Outfitters, Inc.*, 431 F. Supp.2d 351, 367 (S.D.N.Y. 2006)
Fees awarded against plaintiff's attorney
"The following amounts have been assessed against Weingrad pursuant to the rules, statutes and authority indicated: .... TOTAL $65,760.50."
15. *Carlock v. Collins Motors, Inc.*, Civil No. 04CV0370-J (RBB); Loislaw p. 7 (S.D.Cal. 2005)
Fees awarded against individual plaintiff
"Defendants' Motion for Attorney's Fees and Costs and AWARDS Defendants reasonable attorney's fees and costs in the amount of a$20,863.70."
16. *Balcar v. Bell And Associates, LLC*, Civil Action No. 5:02CV2 (STAMP); Loislaw 15 (N.D.W.Va. April 3, 2003)
Fees awarded against individual *pro se* plaintiff
"For these reasons, plaintiff is sanctioned in the amount of Two Thousand Dollars ($2,000.00)."
17. *Van Tu v. Koster*, Case No. 2:00-CV-807B; Loislaw unpaginated (D.Utah January 14, 2003)
Fees awarded against individual plaintiff
"For the reasons stated above, the Court GRANTS defendant's motion, awarding defendant $12,055.50 for attorneys' fees and costs...."
18. *Angelico v. Lehigh Valley Hospital Inc.*, 184 F.3d 268, 280 (3rd Cir. 1999)
Affirmed District Court

Fees awarded against individual plaintiff
"...the District Court awarded $1,000 to attorney Peters for his costs in preparing to defend the withdrawn antitrust claims against him and his firm."
19. *U.S. v. Hurwitz*, CIVIL ACTION H-96-1164.; Loislaw p. 3 (S.D.Tex. April 14, 1999)
Fees awarded against individual defendant
"The court will award Hurwitz $110,122.65 for attorney's fees and expenses...."
20. *Carroll v. The Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 292 (5th Cir. 1997)
Affirmed District Court
Fees awarded against defendant law firm
"Instead, relying on its inherent power, the district court imposed sanctions against Jaques in the amount of $7,000...."
21. *U.S. v. Chicago Blower Sales Of Buffalo, Inc.*, 851 F. Supp. 83, 86 (W.D.N.Y. 1993)
Fees awarded against attorney for a defendant
"....judgment shall be entered by the Clerk against Jeffrey Lazroe in the sum of $10,439.50, with interest."
22. *Matter Of Case*, 937 F.2d 1014, 1021 (5th Cir. 1991)
Affirmed District Court
Individual bankruptcy debtor
"The district court did not err in affirming the bankruptcy court's award of $32,022.95, representing the reasonable attorney's fees...."

List of the 22 amounts 0f attorney's fees awarded in 22 cases as attorney's fees from the date of the decision in *Chambers v. Nasco, Inc.*, 501 U.S. 32

(1991) to September 30, 2009, in which an individual plaintiff, *pro se* plaintiff or defendant or an attorney or expert of such plaintiff or defendant was sanctioned for a specific amount of money pursuant to the courts' inherent authority/power, and, sometimes, other authorities, as well. There were only 22 cases that involved awards of specific amounts of money against the above-described individuals, out of the 204 cases found in petitioners' search of the Loislaw legal data base of cases of the Supreme Court, all the Circuit Courts and all the District Courts, utilizing the following two searches: (1) "attorney's fees" /75 $ /250 "inherent authority" and (2) "attorney's fees" /75 $ /250 "inherent power."

1. $10,000.00
2. $13,231.97
3. $20,000.00
4. $6,000.00
5. $1,787.55
6. $23,622.38
7. $8,000.00
8. $2648.40
9. $1,724.00
10. $1,399.82
11. $4,000.00
12. $4,000.00
13. $20,000.00
14. $65,760.50
15. $20,863.70
16. $2,000.00
17. $12,055.50
18. $1,000.00
19. $110,122.65

20. $7,000.00
21. $10,439.50,
22. $ 32,022.95
    $359,678.92 (Total)

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3. The Court's invocation of and quotations from Judge Friedman's two Orders of 2000 criticizing Fastov's documents and the Court's criticism of Fastov's "45 pages of objections" to the Magistrate's Report in the 4/25 Order are not clear and convincing evidence of Fastov's bad faith or harassment or vexatious conduct or that

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The "RSF Supp."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT S. FASTOV,	)
Plaintiff,	)
v.	) Civil Action No. 97-000578 (PLF)
CHRISTIE'S INTERNATIONAL PLC, CHRISTIE, MANSON & WOODS LTD. and CHRISTIE'S INC.,	)
Defendants.	)

PLAINTIFF ROBERT S. FASTOV'S DECLARATION UNDER PENALTY OF PERJURY IN SUPPORT OF PLAINTIFF ROBERT S. FASTOV'S SUPPLEMENTATION OF HIS TESTIMONY AND ARGUMENT AT A HEARING ON DECEMBER 18, 2007 SETTING FORTH WHY THE MAGISTRATE JUDGE SHOULD NOT COMPOUND THE ERRORS AND DAMAGE TO PLAINTIFF CAUSED BY THE ORDERS OF SENIOR U.S. DISTRICT COURT JUDGE WILLIAM STAFFORD BY AWARDING CHRISTIE'S ATTORNEY'S FEES AND COSTS

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I. Introduction and overview of Christie's inflammatory, highly prejudicial and very successful actions to cause the Court to be biased against me and to undermine my credibility, honestly and integrity, and the Court's failure to comprehend the relevance and materiality and to factor into its reasoning underlying the Court's Order granting Christie's summary judgment Christie's criminal conspiracy with Sotheby's from 1992-1999 to, *inter alia*, fix consignor commission fees in violation of the Sherman Antirust Act to shaft consignors, like me, and to split the payment of approximately $552 million to settle class action lawsuits brought against them by their consignors.

This Memorandum and my appended Declaration ("RSF Dec.", Ex. A hereto) and Exhibits thereto or otherwise referenced herein supplements and supports my oral presentation to the Magistrate Judge at the hearing of December 18, 2007 to not award Christie's any attorney's fees and costs claimed by Christie's. This Memorandum seeks to. convince the Magistrate Judge that he should not compound the damage to me arising from Judge William Stafford's ("Court") Corrected Order Granting Defendants' Motion For Summary Judgment ("Order"; Ex. 1, RSF Dec.;) and his orders granting Christie's attorney's fees and denying my motion to extend time to file a notice of appeal, which precluded appellate review of the Order.

In the Order, the Court, in essence, failed to cite and apply and ignored Black Letter law principles of

summary judgment,[10] and, as a result, committed gross legal errors. Thus, the Court: (i) failed to give

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[10] The Magistrate Judge is almost certainly aware of these principles. For the Magistrate Judge's convenience, *see* Ex. 4, RSF Dec., setting forth more cases and a more detailed analysis of 4 pages, with appropriate quotations, of more of the following relevant Black Letter law principles. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986); *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 850 (D.C. Cir.2006) ("A court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor."); *Arrington v. U.S.*, 473 F.3d 329, 333 (D.C. Cir. 2006) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge" ruling on a motion for summary judgment."); *Mazaleski v. Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977) ("When motivation is involved and credibility becomes of critical importance, or when essential facts are solely within the control of the moving party, summary judgment generally is inappropriate. We believe that summary procedures should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."); *Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 344 (D.C. Cir. 1982); *Mccord v. Bailey*, 636 F.2d 606, 621 (D.C. Cir. 1980); Note of the Advisory Committee on Amended Rule 56 ("Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."); 10A *C. Wright, A. Miller & M. Kane, supra*, § 2732. "Courts have long held that summary judgment generally is inappropriate to decide questions of scienter, knowledge, and intent."; *Tavoulareas v. Piro*, 759 F.2d 90, 104 (D.C. Cir. 1985) ("Proof of mental state very often "depends ... on the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination " ... Thus, in the ordinary case, federal courts are reluctant to decide state of mind issues in summary fashion."); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, fn. 4 (D.C. Cir. 1998) ("plaintiff may be able to prevail [on

my evidence, as the non-moving party, any meaningful consideration or to draw appropriate inferences therefrom in my favor, (ii) resolved many highly disputed material facts in favor of Christie's; and (iii) failed to have the disputed material facts determined by the jury, the appropriate finder of fact. Thus, the Court assessed, most importantly in this case, the credibility, demeanor, motive and intent of Christie's witnesses, myself and my witnesses; and drew inappropriate inferences and conclusions therefrom as to material facts and the weight to be accorded such facts. As a result, the Court reached totally erroneous legal conclusions on each legal issue. For these and other reasons set forth herein, the Magistrate Judge should recommend to the Court that Christie's is not entitled to any of the attorney's fees and costs of $630,043.32.

There is little doubt that the Court was significantly, if not dispositively, influenced to make its explicit and implicit legally inappropriate credibility, knowledge and intent findings, and s other findings adverse to me, in such Order as a result of Christie's counsels' strategy of attempting to prejudice and bias the Court against me in a very inflammatory manner, via irrelevant and unwarran-

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summary judgment] on the basis of his initial prima facie case alone, "combined with effective cross-examination of the defendant. *Burdine*, 450 U.S. at 255 n. 10"); *U.S. v. Project On Government Oversight*, 454 F.3d 306, 313 (D.C. Cir. 2006) ("Evaluation of the credibility of witnesses must be left to the factfinder....and "the need to assess the credibility of witnesses is precisely what places this dispute outside the proper realm of summary judgment.").

ted character assassination of me by commenting upon and providing a copy of the Memorandum Opinion issued by Judge Alexander Williams, US District Court of Maryland, in *Robert S. Fastov v. Palisades Swimming Pool Association, Inc.* ("Palisades") Civil Action No. AW-05-CV-1780 of January 31, 2006 (Ex. 2, RSF Dec.). Thus, Christie's counsel advised the Court of a case, in which I asserted that Palisades had defamed me by writing a letter in which it falsely accused me of sexual perversion (child molestation, pederasty, pedophilia and other inappropriate sexual conduct) and battery and assault. This Christie's successful summary judgment attack was contained in a letter of February 7, 2006 transmitting a Notice of Filing Supplemental Authority and such Opinion, which was adverse to me; were irrelevant to the summary judgment issues in this case; and provided notice that Christie's would be seeking sanctions. This submission, to which I objected on February 9, 2006,[11] contained unjustified, hostile and incorrect speculation as to my motives, honesty and credibility,[12] also irrelevant to the summary

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[11] I wrote the Court a letter dated February 9, 2006, in which I strenuously objected to Christie's counsel's such February 7 submissions essentially on the foregoing grounds, that they were untimely filed, and requested the Court to not consider such submissions.

[12] Such Opinion was generated by the filings of Palisades' counsel with Judge Williams, which, like Christie's filings, manifested character assassination of me and hostile and incorrect speculation as to my motives, honesty and credibility in pursuing my claims, when the record was clear that I was only attempting to achieve a settlement whereby Palisades would withdraw and disclaim its defamatory assertions. Palisades' counsel filed his pleadings of this nature, only after

judgment issues,[13] which the Court is barred by Black Letter summary judgment law principles from determining in a summary judgment decision, but which the Court clearly did. The Court clearly was influenced significantly by the highly prejudicial contents of Christie's submissions and Judge Williams' irrelevant, but prejudicial Opinion in rendering the Court's Order and his order awarding Christie's attorney's fees.

Since the Court issued its 3 damaging orders against me in *Fastov v. Christie's*,[14] Palisades and I entered into a Settlement Agreement, which acknowledged the merits of my claim and waived any right Palisades had to the attorney's fees and costs that Judge Williams had authorized in such Opinion, based on his erroneous assessments of my motive and intent. Section 3 of such Agreement provided me with declaratory relief I sought against Palisades for it's defaming me with no credible factual basis as a person who engaged in child molestation, pederasty, pedophilia, or any other inappropriate sexual conduct, battery and assault. Section 2 thereof required Palisades' counsel to file a

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such Palisades' counsel had consulted with counsel for Christie's, as a result of which Palisades' counsel perceived the utility of and adopted such Christie's "character assassination" strategy.

[13] Christie's did not file a counterclaim against me predicated on my alleged bad faith threats of litigation and harassment of Christie's; thus, these issues were irrelevant to the Court's consideration of whether or not Christie's was liable to me for its actions and inaction commencing in 1993, which were the predicate for Christie's summary judgment motion.

[14] This Order and his orders denying my motion for an extension of my time to file a notice of appeal, and awarding Christie's fees and costs.

motion, which was done by Palisades' counsel and which was granted by Judge Williams, whereby Palisades withdrew and dismissed its claim against me for approximately $40,000 in attorney's fees and costs. *See* RSF Dec., ¶¶ 5.-6. The Christie's submission and such Agreement and the implications thereof should cause the Magistrate Judge to recommend that Christie's is not entitled to fees and costs.[15]:

Thus, the Court unnecessarily went out of its way to provide quotations from such letter to demonstrate irrelevantly and erroneously that such letter was written by me with the motives and intent primarily to threaten and harass Christie's with litigation, which is impermissible under Black Letter law summary judgment principles and irrelevant to the summary judgment decision. The Court's use of quotations from my pre-litigation letter and his

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[15] By ignoring my objection and denying my motion to extend time to file my notice of appeal, the Court precluded appellate review of the Court's consideration of the Christie's submission and Judge Williams' highly prejudicial and irrelevant Opinion. This assertion is supported by the Court's findings in his Order, that at best had marginal relevance to the pending summary judgment motion, regarding my letter to Poltimore of July 2, 1994 ("Poltimore letter"), in which I was seeking a settlement, but threatened litigation, if settlement was not achieved, and setting forth quotations therefrom at pp. 10-11 of the Order to support its damages findings at p. 24. "Quite simply, Fastov's claims to damages defy all credulity; indeed, they make sense only when viewed in the context of his open threat to achieve "Christie's unconditional surrender." *See* Ex. 10 (my Poltimore letter), to Attachment B to my declaration supporting my Response to the Court's offer of December 7, 2005 to receive additional evidence and argument ("RSF Response") and my discussion of the Court's erroneous damages findings on pp. 22-24 of the Order, at p. 41 et seq. *infra*.

findings track Judge Williams very similar quotations from my pre-litigation letters to Palisades and his erroneous findings re my motive and intent in such pre-litigation letters to Palisades to sustain his award of sanctions, which Palisades had formally requested.,[16] but which Christie's had not in its motion for summary judgment. At pp. 12-13, Order, the Court also quoted from Judge Friedman's orders of June 27 and August 29, 2000, regarding the possible imposition of sanctions upon me, which are equally irrelevant to the substantive disposition of the Christie's summary judgment motion. The Court, thus, with the inclusion of all of these legally irrelevant quotations invited Christie's to file a motion for sanctions and attorney's fees, which Christie's had telegraphed in advance in its above February 7 letter and Notice, which was subsequently requested by Christie's and ordered by the Court. In this order, the Court quoted (at pp. 2-4) the same quotes from the Poltimore letter as appeared at pp. 10-11 of its summary judgment Order and repeated at p. 4 of this order the above-quoted text from p. 24 of such Order. The Court did so to support his findings at p. 5 of this order that "Plaintiff first initiated, then prosecuted this lawsuit in bad faith for the purpose of harassing Defendants (Emphasis added.)," justifying the award of attorney's fees to Christie's. Thus, the Court was influenced by this Christie's prejudicial strategy and tactic in awarding Christie's attorney's fees based on an improper characterization of my Poltimore letter. In addition, the Court did not factor into its "threat/harassment" analysis decision that my

[16] *See* pp. 3-5, 11-16 of such Opinion. Ex. 2, RSF Dec..

Poltimore letter was written in direct response to Poltimore's lulling effort of requiring me to put my views in writing,[17] discussed *infra*, and that I made clear in the first sentence thereof [18].and elsewhere[19]

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[17] *See* RSF Dec., ¶ 19 for relevant excerpts from Poltimore Dep. pp. 163-164, 178-180.and my Verified Complaint filed on March 21, 1997 ("VC"), a courtesy copy of which is attached as Ex. 3, RSF Dec.; ¶¶ 305-306, 309, 313), Ex. 4 to my memorandum opposing summary judgment, July 7, 2000 ("RSF Memo"); Ex. 4 to my declaration supporting my surreply to Christie's summary judgment motion, January 19, 2001 ("RSF Surreply"), discussed at pp. 31-32, *infra*.

[18] "I am writing to you pursuant to our telephone conversation of March 23, 1994 in an attempt to persuade you to accept a compromise settlement proposal to resolve a claim I have against Christie's. (Emphasis added.)" *See* VC, ¶ 325.

[19] Re the Poltimore letter, *see* Ex. 9, to Attachment B to my declaration appended to my letter to the Court in response to the Court's offer of December 7, 2005 to receive additional evidence and argument, January 16, 2006 ("RSF Response"). *See* VC, ¶¶ 324-335 detailing the contents of the 79 page Poltimore letter and 13 attachments thereto, including 5 handwritten attachments of in excess of 260 pages, and its purposes, which make crystal clear that I was attempting to resolve a problem, and that my overriding purpose was to achieve a fair, expeditious settlement with Christie's and avoid litigation. (VC, ¶¶ 326-327, 329-335) *See* Attachment 5 to my declaration supporting my memorandum in opposition to the declaration of Michael E. Salzman in support of Christie's application for attorney's fees and costs, May 8, 2007 ("RSF Memo. Opp. Fees"), which includes Attachment C to the Poltimore letter, an analysis of a potential lawsuit and the implications thereof, if settlement was not achieved; Attachment D, entitled "Two Settlement Proposals," which contained a discussion of the settlement proposals and the costs and benefits for Christie's of such proposals; and Attachment E, a draft settlement agreement. I created over 340 pages of text for Poltimore, appended most of the key historical documents in this matter and shipped them all off to Poltimore pursuant to our telephone conversation of March 23, 1994, in what turned

that my purpose was to achieve a fair settlement. The Court also totally ignored my 5 letters to the Chairmen of the three Christie's defendants and two other Christie's officials and 4 extensive enclosures of May 13, 1997 (2,214 pages in the aggregate), that I wrote in response to Ludkin's "lulling" statements of August 18, 1994,[20] that I put my views in writing, and which I had hoped to transmit to Christie's prior to the filing of my VC on March 21, 1997.[21] These lengthy documents contained detailed factual and legal analyses and made clear I was attempting to achieve settlement and avoid litigation.,[22] but was

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out to be a vain attempt by me to persuade Poltimore to accept one of my settlement proposals or to propose his own settlement proposal to resolve this problem. When Christie's appended my Poltimore letter as Ex. 14 to the David Biester declaration ("Biester Dec.") in support of Christie's summary judgment motion, Christie's made no mention of any of these or other such Attachments to such letter in its supporting memorandum and did not attach them to the Biester Dec., nor were they mentioned or appended to the Christie's motion and memorandum seeking attorney's fees of April 6, 2006.

[20] *See* VC ¶¶ 368-372 and the transcript of this tape recorded conversation (Ex. 13, RSF Surreply).

[21] I knew that I had to file by that date to avoid a statute of limitations bar. *See* discussion, *infra*, at pp. 30-33.

[22] S*ee* RSF Dec., ¶¶ 7-18 and VC, ¶ 421, which makes crystal clear that I was not seeking to harass Christie's, including and especially CMW (or "CL") but to obtain a fair settlement of my claims without litigation and Exs. 14-23, RSF Surreply, which contains the text of such letters and the tables of contents of such lengthy enclosures. *See* p. 40, Ex. 14 (my letter to CMW Chairman Balfour): "As I stated to Mr. Aydon in my letter of even date herewith: Thus, while I have written this letter, the Balfour letter and the other letters and have prepared the enclosed [5 inch] Notebook Volumes I, II and III, because I believe, as a matter of public policy, that it is not desirable to clog the US courts with matters in which the defendant can

prepared to file a suit against Christie's, if I could not achieve settlement. *See* RSF Dec., ¶¶ 7-18. Thus, these letters,[23] as well as the Poltimore letter, did not violate the standards set forth in *Chambers v. NASCO, Inc.*, 501 U.S. 32 1991), and/or 28 USC § 1927. In all events, such pre-litigation threat letters, especially when accompanied by an attempt t to achieve settlement with a threat of litigation if settlement is not achieved, are immune to lawsuits and claims for attorney's fees, per the *Noerr-Pennington* doctrine.[24]

Moreover, the Court did not factor in the 1992-1999 criminal conspiracy between Christie's and

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only mount a substantive defense via perjury and cannot win, and that it is better for CL to disavow and not to ratify the actions and failures to act of the CL employees and Directors and to consider resolution of this matter outside the court room now, I am fully prepared and highly motivated to pursue this matter till, as the old saying goes, Hell freezes over (Emphasis added.)." *See* p. 16, Ex. 17 (my letter to CMW's counsel, Aydon) for essentially the same text.

[23] The great amount of energy and time (2 ½ years) that I spent in conducting the research, analyzing, writing and assembling these documents and their contents make clear that I had very credible claims against Christie's; should have prevailed on Christie's summary judgment motion; and most certainly did not pursue Christie's in bad faith, vexatiously with baseless threats and for the purpose of harassing Christie's.

[24] *See* pp. 16-21, RSF Memo. Opp. Fees re the *Noerr-Pennington* doctrine and my arguments in the ensuing pages of such Memo, including those based on *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78-80 (2nd Cir. 2000), which made clear that the Poltimore letter was not an appropriate predicate for sanctions and for compensating Christie's with fees for such letter. Judge Williams also failed to consider *Noerr-Pennington* in his Opinion sanctioning me, in large part, on the basis of my pre-litigation "threat" of litigation letters to Palisades that were also primarily directed at achieving settlement.

Sotheby's to fix consignor fees in violation of the Sherman Antitrust Act and to take other actions damaging their consignors, like myself. The conspiracy was initiated shortly before Christie's fraudulently solicited my consignment, and I contacted Christie's concerning consignment of my painting by Emil J. Schindler ("Schindler"), a very valuable 19th Century Austrian artist, to the Christie's German and Austrian sale of May 20, 1993 ("GA sale"), that is the subject of this litigation. Christie's and Sotheby's each paid half of the $552 million in the aggregate to settle the civil suits brought by their consignors based on this conspiracy. The same arrogance, fraud, bad faith, abusiveness and dishonesty that generated the conspiracy underlay Christie's true reasons, pp. 18-22, *infra*, for taking their damaging actions against me, and the proper trier of fact, the jury, would have questioned the credibility of Christie's officials.[25]

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[25] *See* discussion pp 18-20, *infra* and my extended discussion of the conspiracy at pp. 27-38 of RSF Response, entitled, in part: "C. Christie's Participation In A Price Fixing Conspiracy With Sotheby's From C. 1992 To 1999, In Which They Agreed To Adopt And, In Fact, Maintained During This Period Identical Commission Fee Schedules For The Commissions Consignors Paid Them On Sales...." and my supporting declaration and Exhibits 12 (pertinent *NY Times* articles) 13 (*The Art of the Steal (Inside the Sotheby's-Christie's Auction House Scandal)* by Christopher Mason) in Att. A thereto. Had this conspiracy not been covered-up by Christie's until 2000, and I had become aware of it before filing my Surreply on January 19, 2001, discovery and other aspects of this litigation would have been materially altered, including the denial by Judge Friedman of my motion for discovery of crucial documentary materials pertaining to other Christie's wrongdoing against Christie's consignors and my motion for discovery based on the crime-fraud doctrine and the noticing of additional depositions and

II. Credibility issues and disputed material facts as to key fact findings underpinning the Court's Order abound in this case and totally undercut the legitimacy of the Court's factual and legal findings in its summary judgment Order.

There were many clearly and credibly disputed material facts, which the Court improperly weighed and determined in Christie's favor, many of which were predicated on Christie's readily impeachable and demonstrable fabricated "factual" assertions, as demonstrated, *infra*. The Court further erred by improperly ignoring and not giving any consideration or any effect, whatsoever to my evidentiary submissions or the inferences to be drawn therefrom, as he is legally required to do, and weighed and made unsupported or controverted factual determinations, which was legally improper, in favor of Christie's. Such findings were based on the Court's unfavorable assessments of the credibility of my evidentiary assertions concerning conversations with Christie's officials and myself, many of which were supported by documents, and others.[26] The Court ignored the evidence that I

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the nature of the depositions, which were taken and all concluded by early 2000, including that of Christie's Inc.'s Chairman Burge, who apparently had knowledge of the conspiracy, a topic which was not explored in his deposition on April 6, 1999. Had I been able to bring this conspiracy to Judge Friedman's attention, he might have acted on Christie's motion for summary judgment and failed to take any action in this matter from early 2001 till February 24, 2005, when this case was assigned to Judge Stafford. As noted above, I brought the conspiracy to Judge Stafford's attention in the RSF Response, filed on January 16, 2006.

[26] The Court made legally improper and incorrect favorable assessment of the credibility of Christie's witnesses' almost

presented from the depositions and declarations of the various Christie's officials involved in this case, Goldsmith, Schönburg-Hartenstein ("S-H"), Maclean, Poltimore, Ludkin, Hall, Goddard and Southern, which contradicted and impeached the testimony of other Christie's officials on facts and their own testimony that: (i) were very material and relevant to the resolution of Christie's summary judgment motion, (ii) supported or conflicted with my evidentiary assertions regarding material facts, (iii) undercut and contradicted the findings of the Court in his Order regarding key material facts and made manifest that there were key material facts in dispute. Thus, the appropriate fact finder, a jury, not a judge, should have resolved these factual issues on the basis on credibility determinations, that I was entitled to pursue through cross-examination of the Christie's witnesses, which, as will be detailed, *infra*, I could have effectively done in a fashion that would have permitted me to prevail before a jury at trial. The Court's granting Christie's summary judgment was inappropriate under such legal principles.[27] Thus, the Court succumbed to Christie's counsel's strategy based on attacks on my credibility and character assassination, buttressed by Judge Williams Opinion and Christie's comments thereon, which was an inappropriate basis for granting Christie's summary judgment.

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exclusively oral evidentiary assertions regarding Christie's and telephonic interactions with me, which were not supported by any documentary evidence.

[27] *See* p. 1, *supra*, and `Ex. 4, RSF Dec., setting forth in 4 pages a more detailed version of these Black Letter law principles.

A. The Court's flawed and totally unjustifiable acceptance, as true, of Christie's incontrovert-tibly *post facto* fabricated rationale for withdrawing my Schindler painting from the GA sale that was set forth in the letter of Christie's Maria Ludkin to me of July 11, 1994 was erroneous.

1. The Court stated at p.11, Order, with respect to the letter of Ludkin to me of July 11, 1994 ("Ludkin letter"; VC,[28] ¶¶ 344-366; Ex. 10, RSF Response, Att. B):

> Ludkin reiterated that CMW had been unwilling to sell my painting because Frödl had been unwilling to commit an opinion on the basis of photographs. She reminded Fastov that it was he, Fastov, who had declined to make arrangements for the picture to be sent to Vienna for visual inspection. (Emphasis and bold face added.)."

The truth of this Ludkin fabricated assertion and the totally improper inferences that the Court drew from this "Christie's fact," and the other false assertions made by her in such letter,[29] including the

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[28] My evidentiary assertions in the VC, most of which were based on my contemporaneous hand written notes of my conversations with Christie's officials and letters and documents generated, primarily by me, in this matter, were reaffirmed in ¶ 2 my declaration under penalty of perjury supporting my memorandum in opposition to Christie's motion for summary judgment of July 7, 2000. *See also* pp. 1-2 of RSF Response referring the Court to such reaffirmation.

[29] Ludkin's other erroneous and fabricated assertions, which were disputed and impeached by other evidence, including her statements re Christie's non-existent legal power under its unsigned, unamended, unexecuted Receipt form to consult an expert, were:

highly disputed fact that Ludkin's assertions were reiterations of previous statements made by other Christie's officials, are the most material disputed facts in this litigation and were a gross perversion of summary judgment principles, which poisoned and infected all of the Court's findings regarding the CPPA, statute of limitations, damages and emotional distress. Ludkin's assertions are incontrovertibly egregious fraudulent lies.[30] Poltimore impeached and contradicted Ludkin, by admitting that the reasons that Christie's withdrew my Schindler painting from the GA sale were: (1) "Based upon the response from Dr. Frodl, I had genuine doubts as to the authenticity of the painting;";[31] which he still held as

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Dr Frodl was contacted by Christie's Vienna, who showed him photographs of the picture and asked for his opinion. At no time did Christie's ask for, or Dr Frodl promise, to provide a certificate of authenticity. Dr Frodl made it clear that he could not give a certain view of the picture until he had the opportunity of seeing the picture itself. You declined, however, to make arrangements for the picture to be shipped to Vienna. In view of Dr Frodl's uncertainty about the picture, we exercised our right to withdraw the picture from sale and, indeed, from the catalogue which was about to be printed. I would refer you to paragraph B 1(b) of the Conditions of Business. We are grateful to you for confirming that Dr Frodl was also unable to provide you with a binding opinion on the authenticity of the picture. It was precisely this uncertainty that led us to exercise our discretion to withdraw the picture from sale (Emphasis and bold face added.)."

[30] Ludkin was probably inspired to make this fabrication when she read the translations of Frodl's June 15, 1986 and March 11, 1994 letters to me, that I enclosed with my Poltimore letter of July 2, 1994 (Exs. 3 and 8, respectively, RSF Response, Att. B).

[31] *See* ¶ 29 of the Poltimore's declaration of April 20, 2000 (Ex., apparently unnumbered, Biester Dec..

of the date of his deposition.; [32]or (2) Poltimore's learning from Goldsmith that Frödl had "reservations" or "doubts" about the authenticity of my painting.[33] Poltimore's doubts were so strong that he stated he would not offer my painting as a work that was merely "attributed to Schindler."[34] Maclean also testified several times that it was Frödl's "doubts" about authenticity of my painting that caused the Christie's withdrawal decision.[35] Frödl well-documented that he had such doubts, reservations and concerns about the authenticity of my painting.[36] S-H also testified that Frödl needed to

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[32] *See* RSF Dec., ¶ 45 for relevant excerpt from Poltimore Dep. p. 198; Ex. 4, RSF Memo; Ex. 4, RSF Surreply.

[33] *See* RSF Dec., ¶ 20 for relevant excerpts from Poltimore Dep. pp. 103-107, 118-120, 121; Ex. 4, RSF Memo; Ex. 4, RSF Surreply.

[34] An "attributed to" Schindler catalogue entry would reflect a Christie's opinion the painting might be by Schindler, but Christie's was not sure that it was authentic. *See* RSF Dec., ¶ 21 for excerpt from Poltimore Dep. pp. 191-192.

[35] *See* RSF Dec., ¶ 22 for relevant excerpts from Maclean Dep. pp. 106-108, 111, 130, 140, 189, 195,- 97; Ex 9, RSF Surreply. Maclean also conceded that Frödl had "not been thorough" in developing his doubts. *See* Maclean Dep. pp. 229-230.

[36] Re Frödl's doubts about the authenticity of my Schindler painting, Frödl stated in his letter to me of June 15, 1986, that "that the painting "is of Schindler's hand" or, alternatively, "comes from" or "originated from" the hand of Schindler" (variants of German translation, which manifest an art expert's view that the painting is authentic) although the foreground with the sheep and the representation of the water seems rather untypical (atypical) for him. (Emphasis added.)." *See* VC, ¶ 4; Ex. 3, RSF Response, Attach. B. Frödl also made reference to these atypical elements in ¶ 3 of his letter to me of March 11, 1994. *See* VC, ¶ 264; Ex. 8, RSF Response, Att. B. *See also* ¶ 9 of Frödl's declaration (Ex., apparently unnumbered, Biester Dec.), in which he specifically

inspect the painting, "in light of concerns he had about the apparent weakness of some elements of the painting."[37] Obviously, this testimony totally discredits the Ludkin rationale based on the mere procedural inability of Frödl to inspect the painting,; which I had precluded by declining "to make

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reconfirmed his 1986 concerns: "My conclusion in 1993 was the same as in 1986. Certain elements appeared atypical and aroused several concerns to me...." S-H told me on April 2, 1993 that Frödl "now believed that Fastov's painting was not an authentic work by Schindler and was a fake and that, as a consequence, Frödl would be unable to provide CL with his previously promised written certificate of authenticity," and the only reasons Frödl cited to S-H for his change of mind were the "atypicality" and a lack of "quality" of Fastov's painting." *See* VC, ¶¶ 173-175. Even Frödl has credibility problems. *See* fn. 43, *infra*, quoting ¶ 1 of the Frödl letter to me of March 11, 1994, in which he stated that he was barred from Oesterreichische Galerie from providing opinions to auction houses and collectors that serve "commercial purposes." Thus, he stated in ¶ 3 thereof that he did not provide Christie's with an opinion, whereas, Poltimore and Maclean testified that Frödl did provide an opinion, which was that Frödl had "doubts" or "reservations" about the painting's authenticity. Moreover, Poltimore also testified that he could "recall other occasions when Dr. Frodl has been asked to give CMW opinions regarding works purportedly by Schindler" and cited such an occasion in 1996. *See* ¶ 26, Poltimore declaration (Ex., apparently unnumbered, Biester Dec.). *See* ¶ 11, Goldsmith declaration, March 5, 1999, Ex. 46, RSF Memo; ¶ 20, Goldsmith declaration, April __,2000, Ex., apparently unnumbered, Biester Dec.) for essentially the same statement. Frodl clearly had a conflict of interest, as he was providing Christie's with an opinion, for which, Goldsmith stated Frödl was to be paid an estimated £200-£250 expert fee (*See* VC, ¶¶ 52, 90, 98, 102, 208), which was the kind of conflict of interest that the Oesterreichische Galerie policy was designed to avoid.

[37] *See* ¶ 9 of S-H declaration (Ex., apparently unnumbered, Biester Dec.).

arrangements to ship the picture;" and thus, his inability to provide an opinion on authenticity. This testimony, particularly Poltimore statement (1), is very close to what I was, in fact, told originally by Goldsmith and S-H on April 1-2, 1993 and reiterated to me by Maclean on November 5, 1993 and Poltimore on March 23, 1994, that Frödl had provided Christie's with a negative opinion on authenticity to the effect that my painting was not authentic and, additionally, was a fake, an opinion with which Christie's concurred...[38] which was corroborated by former wife.[39] Thus, Poltimore, Maclean and S-H also impeached Goldsmith's primary rationale for Christie's withdrawal decision, which was a variant[40] on, but different from and impeached the Ludkin above-stated rationale. But even Goldsmith gave some testimony, which was

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[38] Per Goldsmith (VC, ¶¶ 120, 124, 126, 132, 136, 138, 146, 148, 161) and S-H (VC, ¶¶ 173, 174, 175, 177, 179, 181) on April 1-2, 1993, I was explicitly advised of the "not authentic" and "fake" withdrawal rationale. This Christie's "party line" regarding the existence of the Frödl negative opinion was repeated to me by Maclean on November 5, 1993 (VC, ¶¶ 238, 240-242, 245) and Poltimore on March 23, 1994 (V. C. ¶¶ 278, 282, 284, 286, 288, 291, 293, 297, 299, 305, 312, 313.), when they, subsequently refused to offer my Schindler painting as an authentic Schindler, notwithstanding their knowledge and significance of the June 15, 1970 Fuchs' Gutachten, I received in early November 1993 (VC, ¶¶ 221-224) and Fuchs was and as of 2000 still was the Christie's expert on Schindler in the Christie's expert list. *See* Exs. 27, 28, RSF Memo; Exs. 24, 25, RSF Surreply.

[39] My former wife, Alison Fastov corroborated in deposition that I believed Christie's told me my painting was not authentic and a fake, and I asked Christie's many times to change its mind and offer it for sale. *See* RSF Dec., ¶ 23.

[40] *See* discussion, p. 16, *infra*.

consistent with the withdrawal rationale and predicate provided by Poltimore and Maclean, which further impeached the Ludkin rationale.[41]

2. Ludkin did not., as the Court asserted, "reiterate" Christie's position, but rather, for the very first time during 1993-1994 trotted out on July 11, 1994 this readily demonstrable palpable Christie's lie, in which she supplied me with a new and different very mendacious justification to continue Christie's cover-up regarding Christie's true reasons for withdrawing my painting from the GA sale on April 1- 2, 1992 and Christie's subsequent refusals to offer such painting for sale in 1993 and 1994, which Goldsmith, S-H, Maclean and Poltimore, in fact, predicated on a Frödl negative opinion that my painting was not authentic and a fake.[42]

B. Other parts of the Ludkin letter set forth other dishonest and material assertions from which the Court obviously inferred that Frödl was the preferred expert that Christie's relied on to provide authenticity opinions for Schindler works, and that a

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[41] *See* RSF Dec., ¶ 24 for relevant excerpt from Goldsmith Dep. I, p. 230; Ex. 3, RSF Memo; Ex 3, RSF Surreply.

[42] No Christie's official, with whom I spoke, ever demanded or requested me to he make arrangements to ship the painting to Vienna for Frödl's inspection; I never declined such a mythical Christie's request or demand at any time. (V C ¶ 262, 348, 354, 363; *see* also, Fastov Dep. 210-213). Per my telephone conversations with Goldsmith on April 1, 1993 (VC, ¶¶120-170) and 2, 1993 (VC, ¶¶184-190), S-H on April 2, 1993 (VC, ¶¶ 171-183), and Maclean on November 5, 1993 (VC, ¶¶ 225-257) and Poltimore on March 23, 1994 (VC, ¶¶272-323), the Christie's officials with whom I dealt, never discussed with me the above Ludkin letter rationale for Christie's action in our telephone conversations.

binding positive opinion on authenticity on my painting from Frödl was a *sine qua non* for Christie's offering my painting for sale, which were also part of the fraudulent Ludkin factual lynch pin of the Order.

I disputed these assertions and their inferences vigorously and credibly. My evidentiary assertions dispute and indisputably controvert the above Ludkin "reiteration" assertions, including these inferences, as characterized by the Court, include the testimony of other Christie's officials with whom I spoke and other evidence. My assertions demonstrate that such Ludkin assertions and the inferences drawn therefrom are incontrovertibly false.

1. Christie's selection of Frödl as an expert on Schindler and my Schindler painting are explicitly impeached by: a c. 1993 typewritten and pen and ink annotated version of Christie's "19th Century Continental Pictures Expert List" and a two page excerpt from a contemporary (c. March 20, 2000) computer data base version of this list.[43] Both lists list Dr. Heinrich Fuchs as THE Christie's Schindler expert, not Frödl.[44] Poltimore admitted Frödl was

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[43] These lists were mentioned at Poltimore's deposition of March 16, 2000. Christie's had failed to produce these lists, until Poltimore's deposition, even though I asked for them much earlier in my discovery document production request. Such expert list documents are Exs., 27 and 28, RSF Memo; Exs. 24 and 25, RSF Surreply.

[44] Unlike Fuchs, Frödl has never written a catalogue raisonné or any other book on Schindler. Goldsmith spoke with Frödl in 1998, but had not spoken with Frödl regarding my painting. *See* Goldsmith Dep. I p. 168. Poltimore learned of Frödl's doubts about my painting as a result of a communication chain of "Frodl to Schonburg [S-H] to Goldsmith to [himself]," and

not Christie's Schindler expert when Christie's contacted Frödl in this matter in 1993.[45]

2. Christie's offered, but did not sell as Lot 366 an unsigned, inconsequential painting entitled "Praterlandschaft" as an authentic Schindler in the GA sale, in which my painting was to have been offered. Christie's did not cite or mention Frödl in the lot 366 catalogue entry, but did cite the painting's being listed and illustrated in Fuchs' catalogue raisonné on Schindler as an authentic Schindler work to establish for the prospective buyers lot 366's authenticity.[46]

3. In "The Norms And Customary Practices And Procedures Of CL [CMW] And Other Major Auction Houses," I furnished Christie's with the May 13, 1997 letters to 5 Christie's officials, p. 6, *supra*, [47] and concluded, in essence:[48]: Regarding 19th Century

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Poltimore had never spoken with Frödl as of his deposition in 2000. *See* Poltimore Dep. pp. 103, 152. *See* RSF Dec., ¶ 49.

[45] *See* RSF Dec.,¶ 26 for excerpt from Poltimore Dep. pp. 42-43; Ex. 4, RSF Memo; Ex. 4, RSF Surreply.

[46] *See* V C, ¶¶ 107, 109-117, in which I told Goldsmith, that this painting was grossly overestimated by Christie's at £30,000-£50,000 and would adversely affect the sale of my painting and could significantly lower the sales price of my painting, if it sold, and pressed her to take certain corrective steps.

[47] *See* ¶¶ 16-28, of my declaration, RSF Memo. Opp. Fees. This evidence also contradicts an assertion by Christie's that a positive expert opinion on the authenticity from any art expert must be obtained by Christie's with regard to any painting by any artist, including Schindler, consigned to Christie's 19th Century Continental Pictures department before such department can offer the work for sale.

[48] *See* an excerpt from this document, which includes key summary parts thereof, pp. 76-105 in Ex. 23, RSF Surreply; and pp. 76-98, 105 in Ex. 7, RSF Response, Att. A. This document, which involved over a thousand hours of research

European/Continental works of art, expert opinions on authenticity were rarely cited in any auction house catalogue entries. No auction house,[49] including Christie's had cited Frödl as a Schindler expert or a Frödl opinion in its catalogue entries for Schindler and, when an expert was cited, it was almost invariably Fuchs, Fuchs' catalogue raisonné[50] or a Fuchs' Gutachten.[51]

4. The Ludkin letter and rationale, accepted without question by the Court, does not address the

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and analyses, on my part, destroys Christie's credibility regarding its use of experts, in general, and using Frödl as a Schindler expert. It makes clear, based on a number of evidentiary bases, that Fuchs was regarded as the world's preeminent expert on Schindler and that the Christie's corporations, including CMW, had used Fuchs as an expert.

[49] The Dorotheum auction house in Vienna sold more Schindler works than all of the other auction houses combined (46 of the 72 sold post 1970 or 62%), and had set the record prices for Schindler's work, per *Art Sales Index*. Hans Fojtl, the Dorotheum's chief specialist/expert in 19th Century Austrian paintings, had always relied on Fuchs as his Schindler expert and had never used Frödl during his 29 years with the Dorotheum.

[50] Fuchs was the author of "Emil Jakob Schindler" (Vienna, 1970), the catalogue raisonné and definitive work on Schindler and the author of the standard 4 volume reference work on 19th century Austrian artists, Die Österreichischen Maler Des 19. Jahrhunderts (The Austrian Painters Or Artists Of The 19th Century).

[51] Even though I received a Gutachten from Fuchs in November 1993, Maclean and Poltimore refused to offer my painting for sale, relying on Frödl's negative opinion and Maclean insisted that I had to get Frödl to reverse his negative opinion and provide me with a positive opinion on authenticity. Re the relevant portions of my conversation with Maclean on November 5, 1993, (VC, ¶¶ 231-232. 237-239, 248-251, 254, 256) and with Poltimore on March 23, 1994 (VC, ¶¶ 273, 283, 289, 290, 206, 312, 318, 323).

devastating implications of the express statements in ¶ 1 of Frödl's letter to me of March 11, 1994 for Christie's credibility re Christie's assertion that seeking and relying upon Frödl's expertise and positive opinion from Frödl and making Christie's receipt of such a Frödl positive opinion a *sine qua non* for offering my painting for sale. Frödl's statements make clear that Frödl's rendering such expertise and opinion a factual and quasi-legal impossibility. Such ¶ 1 makes crystal clear that Frödl could not or should not have provided Christie's with expertise or an opinion concerning the authenticity of my painting for Christie's "commercial purposes," as he was barred from doing so by the policy of the Östereichische Galerie, Vienna, of which Frödl was the Direktor,.52 No Christie's official offered any credible explanation for this inconsistency.[53] Frödl contradicted and impeached Ludkin in another respect.[54]

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[52] *See* VC, ¶¶ 264, 269, Ex. 8, RSF Response, Att. B. Such ¶ 1 stated: "The Osterreichische Galerie in its capacity as a federal museum, as a matter of principle does not provide expertise [or expert opinion, for the German word "Gutachten"] which serve commercial purposes, that is benefit art dealers [, auction houses, in German, "Auktionshäusern," which the translator omitted] or private collectors when they sell or buy works of art. This would not even be allowed. And I respect this rule (Emphasis added.)." The bracketed portions are corrections to the translator's errors.

[53] There is no credible record evidence that Frödl had ever provided Christie's with an opinion prior to 1993. The last time that Christie's (CMW) had offered Schindler works of art were on October 6, 1986, of which Poltimore was not aware in his deposition, and no Frödl opinion or reference appeared in the relevant catalogue entries.

[54] Frödl stated in ¶ 3 of such March 11 letter that, contrary to Ludkin's assertion that Christie' "Dr Frodl was contacted by

C. There are other credibility problems regarding Ludkin and her letter and Frödl's position on having to inspect a painting in order to render an opinion on authenticity.

1. In ¶¶ 7-11 of a Ludkin Declaration of March 8, 1999 (Ex. 47, RSF Memo.), she admitted she had lied to me and, in effect, had stalled, stone-walled and covered-up. [55]

2. In addition to my contemporaneous handwritten notes of my conversations of all Christie's conversations,[56] which are the basis for most of my assertions in the VC and corroborate them, I wrote letters to Goldsmith of April 10, 1993, Frödl of January 19, 1994 and Poltimore of July 2, 1994,[57] in which I made clear that I had been told by Christie's that Frödl had issued a negative opinion on authenticity, as Christie's justification for withdrawing the painting and subsequently refusing to offer the painting for sale.[58] The existence and

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Christie's Vienna, who showed him photographs of the picture and asked for his opinion, (Emphasis added.)," when he stated: "Christie's, too, did not ask me for an opinion on authenticity. *See*; Ex. 8, RSF Response, Att. B.

[55] Ludkin continued the Christie's cover-up, stall and stonewall, when I placed seven unsuccessful telephone calls to Ludkin on August 17-19, 1994 to discuss the Ludkin letter with Ludkin, and she misrepresented herself as Johanna Hall, a solicitor, subordinate to Ludkin, in Christie's legal office, in one such conversation. *See* RSF Dec., ¶ 27; VC, ¶¶ 368-373.

[56] *See* Exs. 12a through 12 r, RSF Surreply for copies of these notes of such conversations.

[57] *See* Exs. 5, 7, 9, RSF Response, Att. B for the text of these three letters, respectively, and VC, ¶¶ 202-212, 258-263 and 324-335, respectively, for my assertions concerning such letters, respectively.

[58] *See also* VC, ¶¶ 216-220 regarding my letter to Fuchs of May 1, 1993 requesting Fuchs to provide me with a letter of

text of my letter to Fuchs of May 1, 1993 requesting a positive opinion on authenticity manifests that I am attempting to overcome the Frödl negative opinion.[59] There is no Christie's written document antedating or following the Ludkin letter, which corroborates in any manner the fabricated Ludkin letter rationale.

3. The Goldsmith note to me that I received on April 20, 1993 (Ex. 29, RSF Memo; VC, ¶¶ 213-215) impeaches the Ludkin letter rationale. It enclosed a transparency (ektachrome) that I had previously requested orally on April 1-2, 1993 and in writing on April 10, 1993 from Goldsmith. It corroborates my assertion[60] that I was attempting to overcome the

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authenticity, and that I wrote such letter in an attempt to overcome the devastating impact of Frödl's negative opinion on authenticity of my painting, with which Christie's concurred. If I had known that Christie's position, per the Ludkin letter, was that a Frödl positive opinion on authenticity was a *sine qua non* for Christie's, my writing such a letter to Fuchs would have been a needless and total waste of my time and energy.

[59] *See* Ex. 4, RSF Response, Att. B; VC, ¶¶ 216-219.

[60]. This was the only document generated by Christie's and sent to me between the date of Christie's transmission to me of the unsigned (by Christie's) Christie's Receipt Form dated March 5, 1993 and the Ludkin letter of July 11, 1994. In such note Goldsmith wrote: "I hope the transparency is of help. I'm afraid its the only one available." Such Goldsmith note, transmitting to me a color transparency of my Schindler painting is totally inconsistent with the Ludkin letter rationale that Frödl had to inspect the painting itself to provide an opinion on authenticity, and is totally consistent with my version of the facts in my conversations with Christie's officials, in which I made clear that I needed the Christie's transparency (ektachrome) of my painting to assist me in my efforts to overcome the negative Frödl opinion on authenticity Obviously, my requesting a transparency (ektachrome) from Goldsmith and Goldsmith furnishing same to me would have been irrelevant and

negative Frödl opinion on authenticity, of which Goldsmith and S-H had advised me on April 1-2, 1993. [61]

4. Ludkin's false accusation that I "declined, however, to make arrangements for the picture to be shipped to Vienna" which Ludkin asserted caused and justified the Christie's withdrawal decision was impeached by a Goldsmith variant in her Declaration of April __, 2000[62] in two respects:[63]. Maclean had no recollection of Christie's ever making this kind of demand upon me.[64]S-H's Declaration[65]makes no mention of the false

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superfluous, if Goldsmith and I had been aware of the Ludkin letter position/rationale that only a Frödl visual inspection of the painting would permit Frödl to provide, per the fraudulent position taken by Ludkin, that Christie's could not offer my painting for sale, unless Christie's has the *sine qua non* Frödl positive opinion on authenticity. *See* VC, ¶¶ 213-215.

[61] *See* my conversations with Goldsmith of April 1-2, 1993 (VC, ¶¶ 151-152, 155-159, 166-167, 188) and S-H of April 2, 1993 (VC, ¶ 182) and my letter to Goldsmith of April 10, 1993 (VC, ¶¶ 204, 210-212); Ex. 5, RSF Response, Att. B.

[62] Ex., apparently unnumbered, Biester Dec..

[63] (1) Instead of Ludkin's false assertion that I declined to make shipping arrangements, Goldsmith asserted that I refused to agree to pay Christie's for Christie's making and implementing arrangements to ship the painting to Frödl in Vienna; and (2) Goldsmith asserted, contrary to Ludkin, that Goldsmith's fabricated offer, which I allegedly rejected, was made to me after, (not as Ludkin, asserts, before and caused the Christie's withdrawal) Christie's had withdrawn the painting from sale In ¶ 15 of Goldsmith's such declaration, she also impeached her assertions in ¶¶ 9-11 in her declaration of March 5, 1999. *See* Ex. 46, RSF Memo.

[64] *See* Maclean Dep. pp. 141, 142, 172, 173.

[65] *See* ¶ 11, Ex., apparently unnumbered, Biester Dec.. This conversation occurred on April 2, 1993. I dispute many of the

assertions in the Ludkin letter in her conversation with me of April 2, 1993 (VC, ¶ 174).

5. My letters to Goldsmith of April 10, 1993 (Ex. 5, RSF Response, Att. B; VC, ¶ 204-206, 211) and Fuchs of May 1, 1993 (Ex. 4, RSF Response, Att. B; VC, ¶ 219), undercut the credibility, contradict and impeach Ludkin's assertion that "You declined, however, to make arrangements for the picture to be shipped to Vienna [for Frödl's inspection and opinion.]" (Ex. 10, RSF Response, Att. B). In these letters, written immediately after the Christie's withdrawal decision, I made clear that I was willing to cause the painting to be shipped to Vienna for inspection by Frödl or Fuchs. In addition, in my letter to Frödl of January 19, 1994 (Ex. 7, RSF Response Att. B; VC, ¶ 263), I manifested my misplaced belief in Christie's honesty by advising Frödl that, while I believed that the photographs I had furnished Frödl were sufficient for him to render an opinion, I was willing to request Christie's to pay for his trip to London to inspect the painting.[66]

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factual assertions in her declaration concerning our conversation.

[66] *See* RSF Dec., ¶ 50. *See*, e.g., my statements in the Goldsmith letter:(On p. 1) "Per our conversation of 3/31/93, Christie's will retain the Schindler painting, until I send shipping or other instructions. As I indicated to you there was a strong possibility that I would ship the painting to Dr. Schönburg-Hartenstein ("Dr. S-H") for viewing." And (On p. 6) "I will advise you on this further, and will provide shipping instructions." Also note that my statement in the January 19, 1994 letter to Frödl also undercuts the credibility of Goldsmith's variant on the Ludkin rationale that Christie's insisted that I pay for the costs of shipping the painting to Frodl in Vienna, so that he could inspect the painting. If I knew this and I were not a believer in Christie's good faith, I would

6. Christie's 1993 and 1994 refusals post Christie's withdrawal of my Schindler painting from the GA sale to offer my painting for sale were made notwithstanding my discussing the Fuchs' Gutachten with Maclean on November 5, 1993 and Poltimore on March 23, 1994 and in my Poltimore letter of July 2, 1994[67] Fuchs had written the catalogue raisonné on Schindler; was the Schindler expert listed on the Christie's own expert lists; Christie's had used Fuchs to authenticate lot 336 in the GA sale.[68]

7. At p. 8 of the Order, the Court, without possessing the requisite knowledge and expertise, accepts without question the truth and merits of Frödl's position that he could not provide "an opinion about the authenticity of the painting without actually viewing the original [painting],"[69] even though I had provided Frödl with museum quality color and black and white photos and color transparencies (ektachromes) of the painting and close-up, blow-ups of Schindler's signature. Frödl's avowed need to actually view a painting differed from the practices of virtually all experts on 19th

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not have made the suggestion that Christie's would pick up the cost of Frödl's inspection trip.

[67] *See* re the Maclean and Poltimore conversations and the Poltimore letter, respectively, (VC, ¶¶ 231-232. 237-239, 248-251, 254, 256); (VC, ¶¶ 273, 283, 289, 290, 206, 312, 318, 323); and (VC ¶¶ 324, pp. 8, 23, 24, 326 of Ex. 9, RSF Response, Att. B).

[68] He was also the leading outside expert regarding Schindler works used by all major auction houses, including Christie's London (CMW), Christie's N.Y. and the Dorotheum in Vienna, which had sold more Schindler works than all of the other leading auction houses combined.

[69] *See* fn. 21, *supra*, re Ludkin's inspiration for this fabrication.

Century paintings used by auction houses, who were willing to render unqualified opinions on the authenticity of a painting based on museum quality photographs and/or transparencies of the painting itself and, if relevant, the artist's signature thereon, which is precisely what I furnished Frödl.[70] Christie's might go out of business, if it insisted on the consignor's obtaining opinions from experts like Frödl.71

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[70] In my letter to Frödl of January 19, 1994 and Attachment A thereto, I made clear that the photographic materials I had furnished him were more than adequate for him to comprehend why I was correct that the painting was authentic, and he should accept such views without having to view the painting itself, but was prepared to request Christie's pay for the cost of a Frödl trip to London, if, in effect, he needed to save face.

[71]. If Christie's insisted that each potential consignor of a work of art must ship a work to an expert for an opinion on authenticity or pay Christie's for making and implementing such shipping arrangements, before Christie's would offer the painting for sale, Christie's could well go out of the art business, as the costs of shipment within and to and from Europe and America are significant, and there is a risk of theft, loss, destruction, harm or damage to such a work in transit to and from the expert. Christie's is supposed to provide this kind of expertise and fraudulently advertised that it possessed this kind of competence and expertise with regard to Austrian art (which it did not) to induce me to consign (*See* VC, ¶¶ 7-9) and thereafter, in discussing the consignment, told me that Christie's possessed such competence and expertise up till April 1, 1993 (*See* VC, ¶¶ 13, 14, 16, 18, 19, 23, 25-28, 31, 32, 40-45, 50, 52, 59, 63, 67, 82, 91, 93, 95, 104, 109) and thereafter. In his deposition (Ex. 10, RSF Surreply), Christie's Burge, Chairman of Christie's NY, in effect, admitted that Frödl's insisting on physical inspection of a painting was a nonsensical "cya" position. Burge admitted that there was a risk of theft, loss or destruction, when a painting was shipped over a great distance (Burge Dep. p. 180), and when asked if there was any valid reason for a painting to be shipped to an expert, who cannot

D. Christie's dishonest and arrogant corporate culture, and Christie's true reasons for treating me in an arrogant, abusive and fraudulent manner.

1. The Christie's officials' motivation, attitudes, values and penchant for illicit, unethical and immoral conduct that underlay and drove the 1992-1999 criminal conspiracy between Christie's and Sotheby's to fix consignor fees in violation of the Sherman Antitrust Act and otherwise damage their consignors,[72] like myself, were the attitudinal predicate for to the Christie's officials true reasons for dealing with me in the arrogant, fraudulent, deceptive, bad faith, unfair, abusive and dishonest fashion with no qualm, that they did in 1993-1994 and 1997. They did this notwithstanding the Fuchs' Gutachten, which Christie's should have relied upon for the reasons set forth, *supra*, to offer the painting for sale. The same motivation, attitudes and values and penchant for arrogant, abusive behavior that underlay and drove the conspiracy were the source of the fraudulent, deceptive and dishonest cover-up,

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provide an expert opinion on authenticity, unless he could inspect the painting itself, Burge replied "I can't think of one" (Burge Dep. pp.183-184). *See* RSF Dec., ¶ 28.

[72] *See* fn. 16, *supra* referring to my extended discussion of the conspiracy at pp. 27-38 of RSF Response and supporting evidentiary materials. Christie's and Sotheby's conspired to and did fix at the same high rate the fees they charged consignors in violation of the Sherman Antitrust Act and also entered into and agreed to engage in other illicit joint actions, including stopping their practices of offering concessions like loans and advances to consignors and charging the same increased buyer's premium at the same rate, that were designed to eliminate competition between Christie's and Sotheby's and to maximize their profits at their consignors expense, thus damaging such consignors.

stall and stonewall practiced upon me by Goldsmith, S-H, Maclean and Poltimore in 1993 and 1994 conversations and Ludkin in a July 11, 1994 letter and our August 18, 1994 conversation. Christie's success in covering-up, stalling and stonewalling the conspiracy may well have driven and was the attitudinal predicate for the decisions of the 3 Christie's chairmen to whom I sent the extensive letters of May 13, 1997 and enclosures seeking a fair settlement, to ignore such letters and to decide to mount a defense of this litigation, utilizing a strategy predicated, at bottom, on character assassination of me and perjured testimony, which continues to this day. Ironically, at the time that Christie's received my May 13, 1997 letters, Christie's received a U.S. government subpoena[73] indicating that the U.S. was investigating Christie's and Sotheby' for, *inter alia*, price fixing in connection with consignor's commissions. On June 2, 1997, Christie's denied the conspiracy and wrongdoing. It continued its stonewall, stall and cover-up of the

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[73] The *New York Times* of June 3, 1997 stated, in part: "Word of the investigation spread through New York City's art world late last week, and yesterday Christie's, the London auction house whose United States headquarters are on Park Avenue, reported, in a filing it made with the London stock exchange, that it had been subpoenaed...Since it is required to report any developments that could affect its stock price, it concluded the announcement by stating that its American subsidiary had recently received a subpoena from the Justice Department "seeking documents relating to the conduct of the U.S. art market."...The statement went on to say that Christie's "understand that other U.S. auctioneers and several prominent New York art dealers have also been required to provide documents. Christie's is cooperating with the Justice Department's investigation. Christie's believes that it has acted properly at all times.'(Emphasis and bold face added.)."

conspiracy, until early 2000, when it decided the jig was up and the best strategy was to beat Sotheby's to the Justice Department's door to cut a deal to minimize or avoid criminal penalties. The fact that Christie's would lose a relatively small commission from the sale of my painting was not any deterrent to this kind of conduct.[74]

2. Instead of granting Christie's summary judgment, the Court should have given me an opportunity to have the jury assess my credibility and truth regarding my assertions regarding the true reasons Christie's had for withdrawing my painting from the GA sale and to weigh such assertions against the credibility and truth of Christie's phony, perjured and clearly impeached and incredible rationale for such withdrawal, as set forth in the Ludkin letter and as accepted by the Court. In this context, the jury could factor in and assess Christie's arrogant, disdainful, abusive, immoral and illicit conduct and lack of integrity and honesty arising from Christie's capacity and belief that it could shaft its consignors at will without concern as to the damage such a Christie's shafting could inflict upon a consignor. Such true Christie's

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[74] The fact that I was one of several thousand of Christie's consignors each year and Christie's would earn a relatively small commission from each consignor, including myself, permitted Christie's to indulge its penchant for arrogant, abusive treatment of me for the reasons set forth in the ensuing paragraphs hereof. In short, the loss of a commission fee that Christie's would earn from me was not a sufficient incentive for Christie's, which generates hundreds of millions dollars in commissions each year, to act fairly and reasonably toward me and not a deterrent to Christie's act in this fashion toward me for such reason. Christie's basic attitude is that consignors are fungible and can be easily replaced.

reasons for the withdrawal decision of April 1, 1993 are, in essence: I had caused Goldsmith and Christie's problems and had put pressure on Goldsmith and, to some extent, S-H, relating to dealing with and resolving three major problems before the imminent catalogue printing deadline for the GA sale: (a) my requesting Goldsmith and S-H in two notes I faxed on March 26, 1993 (VC, ¶¶ 72-75) to resolve the discrepancies concerning the geographic location information developed by S-H and the geographic location information of PhDr. Krízová, an expert on Czech castles, regarding the geographic location of the scene in my painting of Schloss Thallwitz, which I had previously requested to be ascertained by Christie's and to include this location information in the catalogue entry, which might enhance the value of and sales price of my painting; (b) my discussing and pressing Goldsmith in conversations of on March 29, 1993 (VC, ¶¶ 76-117) on such discrepancies and pressing Goldsmith to obtain the previously promised, as of March 19, 1993 (VC, ¶ 52), but as yet undelivered Frödl written positive opinion on the authenticity of my painting, and (c) in such conversations, my insisting to Goldsmith that Christie's put the catalogue entry for my painting in the Christie's catalogue prior to another Schindler painting (what became lot 366 in the GA sale entitled "Praterlandschaft") consigned for the sale. I told her that she and Christie's had provided an unjustifiably high presale estimate of £30,000-£50,000 for this painting, which might cause it not to sell and could harm the chances of my painting selling and/or it bringing a very low price. (VC, ¶¶ 107-117). *See* RSF Dec., ¶ 29.

3. Poltimore, in fact, (but without justification in fact and a pure fabrication), in effect, corroborated by assertions as to Christie's true reasons in the preceding paragraph, when he testified perjuriously that I was a "very abusive,[75] bullying, unfriendly, unpleasant client," who had behaved improperly toward Goldsmith, and that this kind of behavior did not warrant my participation in The Lord Poltimore-conducted, first-ever Christie's German/Austrian sale. [76] I concede that I pressed Goldsmith very hard on the issues set forth in the preceding paragraph, but I was not a bully, who had behaved improperly toward Goldsmith, but consistently provided Goldsmith with valid reasons for my various assertions and requests.[77] Other Christie's officials and Frödl had and still have an animus against me,[78] which, plus the arrogant, abusive Christie's corporate culture manifested against consignors, per the Christie's/Sotheby's conspiracy, explain why Christie's took these arrogant, abusive, damaging actions against me.[79]

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[75] Goldsmith also perjured herself when she discussed why Frödl thought I was abusive as well, based on an alleged "lot of contacts," I had with Frödl in 1993-1994, when, in fact, my only contact with Frödl was my January 19, 1994 letter to him. I never spoke with Frödl. *See* RSF Dec., ¶ 44.

[76] *See* RSF Dec., ¶ 31 for relevant excerpts from Poltimore Dep. re Poltimore's assertion that I was a "a very abusive, bullying, unfriendly, unpleasant client" at Poltimore Dep. pp. 127, 128; *see also* Poltimore Dep. pp. 111-112, 154-157, 228, 229; Ex. 4, RSF Memo; Ex. 4, RSF Surreply.

[77] *See* VC, ¶¶ 76-117; RSF Dec., ¶ 30.

[78] *See* RSF Dec., ¶ 32; Goldsmith Dep. II. pp. 390, 391, 395, 396; and ¶¶ 10-11 of Frödl's declaration, Ex., apparently unnumbered, Biester Dec..

[79]. This could cause these Christie's officials to convey in the future adverse information concerning me and the authenticity

4. This perjurious statement by Poltimore was buttressed by the fabricated statements of Sue Goddard in a fabricated fax to S-H, to the effect that on March 11, 1993, I had "just phoned me [Goddard]—and I think he is going to become a nuisance." I was "adamant" that Christie's contact Fuchs to ascertain the name of the castle, city and river depicted in Fastov's Schindler painting, "check historical information" and "above all" to obtain authentication of Fastov's Schindler painting. She asked S-H: "Can we oblige him with all of this (Emphasis added.)." *See* Ex. 5, RSF, Dec.. This undercuts the credibility of the Ludkin letter withdrawal rationale, and demonstrates a certain arrogance in dealing with me fairly and to discharge its "fiduciary duty to act in the utmost good faith and in the interest of...its principal, throughout their relationship."[80]

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of my Schindler painting to a person who purchased the painting. from me or my agent. Given these considerations and Christie's negative views on the authenticity of the painting, which could readily be leaked or disseminated in the "gossip-hungry" art world, I knew that, as a practical matter, only Christie's could offer my painting for sale as an authentic work if it so chose; and thus, I did not intend to and was not "pursuing his unnecessary and, indeed, abusive crusade against CMW" or "obsessively and relentlessly hounding CMW." I merely wanted to resurrect and sell my painting through Christie's, the only means that appeared available tome. *See* RSF Dec., ¶ 32.

[80] *See* fn. 89, *infra*. It appears that Poltimore and Goldsmith's primary concern was having a problem free and smooth German and Austrian sale, and they had other institutional practices and biases, which demonstrate, as I have previously noted, that Christie's assertions concerning Christie's motivations to earn commissions is simplistic misrepresenta-

5. Finally, it was possible that Poltimore was dishonest or was negligent or incompetent. When we spoke on March 23, 1994, he suggested that I could solve my Schindler painting problem, if he were to offer the painting for sale by Christie's South Kensington, [81] Christie's relatively low cost sales venue, as a "19th Century Austrian school work", even though Poltimore knew that Fuchs had provided a Gutachten certifying that my painting was an authentic Schindler painting and that Fuchs

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tion , which the Court appeared to have accepted. This concern and such practices and biases may have caused Poltimore and Goldsmith to give me short shrift with a rationale that they thought would get rid of me with little or no problem by telling me that Frödl had opined that my painting was not authentic and a fake and Christie's concurred with such opinion. Christie's may also have been motivated to do this, because there was a failure of communication between S-H and Frödl and/or S-H and Goldsmith. *See* RSF Dec., ¶ 34.

[81] Poltimore may have wanted to buy my painting for a pittance on the sly or through a co-conspirator front man, who would place the bid and share with Poltimore the profits. There is well-publicized precedent for this kind of action by a head of a Christie's art department, like Poltimore, which occurred in 1990, shortly before Poltimore's above-described action. Per Bennett, *Fine Art Auctions and the Law: A Reassessment in the Aftermath of Cristallina*, 16 Columbia-VLA Journal Of Law & The Arts 257: Fortunately, for Christie's, the 1990 incident involving Charles Avery, the then Christie's director of its sculpture department and apparent "world expert" on Giambologna, did not generate litigation, because the bust that Christie's had offered and which Avery had valued at £3,000, was recognized by other bidders at the auction as an authentic work by Giambologna and brought £715,000. Avery had improperly bid on the sculpture, but had only left a bid of £3,000. Bennett does not indicate whether Christie's determined whether Avery was an incompetent, a fool or a knave or a combination thereof; however, Bennett does indicate that Avery was forced to resign. *Id.* at 275." *See* RSF Dec., ¶ 35.

was, in fact, Christie's Schindler expert of choice, per its expert list and Poltimore had referenced Fuchs' catalogue raisonné in lot 366 in the GA sale to establish its authenticity. I told Poltimore that offering my painting as "19th Century Austrian school work," would probably only bring $1,000 and rejected his" offer." (VC, ¶¶ 288-289).

III. The Court's statute of limitations analysis and findings were erroneous.

The Court cited and applied improperly the "discovery" doctrine (at pp. 14-18, Order) to the Court's speculative, incomplete and erroneous factual assertions that the Court deemed relevant, many of which I dispute, regarding my contract[82] and tort claims,[83] which are inaccurately and

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[82] The Court does not cite a specific breach of contract, other than implicitly suggesting that Christie's withdrawal decision constituted a breach. Most importantly, the Court did not discuss the breach of Christie's implied contractual obligation of good faith and fair dealing and breach of its fiduciary obligations, both of which arise from the oral consignment agreement (VC, ¶¶ 19-24).and are ongoing in nature.

[83] At pp 17-18, Order, the Court sets forth its version of what it believes are the 7 key assertions relating to my "tort" claims without distinguishing among my many tort claims, which are based on my common law claims of negligence, recklessness, negligent and intentional affirmative misrepresentations or fraud or fraudulent concealment and intentional infliction of emotional distress and my statutory claims based on the CPPA legislation (D.C. Code § 2803901 et seq.) Of the Court's 7 assertions, only assertions (3), (4) and (7) are relevant to the "fraudulent concealment" doctrine, but are not discussed by the Court as such. The Court gives no date re the accrual of my tort claims other than to observe (at p. 18), that "Fastov either knew or with the exercise of due diligence, should have known that he suffered an injury as a result of CMW's tortious conduct more than three years before he filed suit. Like his contract

inadequately characterized by the Court. The following statute of limitations principles make clear that the Court erred in granting Christie's summary judgment, as he barred all of my claims per the DC 3 year statute of limitations. The Court ignored the following additional statute of limitation legal doctrines that can and should have barred Christie's statute of limitations defense: accrual of causes of action:,[84] "fraudulent concealment," "lulling," "equitable estoppel," "equitable tolling" and "continuing" tort or violation of statute or breach of contract. [85]

The factual evidentiary discussion, *infra*, as well as my discussion at pp. 8-22, make clear that the Court failed to apply virtually every fundamental principle of summary judgment law[86] in its statute of limitations analysis, which are clearly applicable to

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claim, Fastov's tort claims are barred by the statute of limitations." Such cursory analysis was a gross abuse of discretion and erroneous.

[84] A statute of limitations for fraud or breach of a fiduciary duty begins to run or accrue when the plaintiff has knowledge of (or by the exercise of reasonable diligence should have knowledge of) (1) the existence of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing. Essentially the same rule applies to other causes of action in this matter.

[85] Ex. 6, RSF Dec. is a more detailed legal analysis of the statute of limitations principles discussed pp. 23-29, *infra*, herein. It provides a significant number of cases in addition to those I discuss, *infra*, which are listed with appropriate page citations, along with the cases I do discuss, *infra*, but with extended quotations from the cases, which support the propositions for which I am citing a given case in my discussion, *infra*. Thus, the Magistrate Judge can refer to this Exhibit to save the time of digging out some of the quotations upon which I rely and for other purposes, if he is so inclined.

[86] *See* p. 1, fn. 1, *supra*, and Ex. 4, RSF, Dec..

statute of limitations issues.[87]The content of my telephone conversations with Goldsmith and S-H of April 1-2, 1993, Poltimore of March 23, 1994 and the truth or falsity of the assertions in the Ludkin letter to me of July 11, 1994 and my resultant knowledge, actions, motive and intent are vigorously disputed material facts,[88] involving the credibility of myself and my evidence and that of the Christie's officials, which are matters exclusively reserved for the jury, not the judge.[89] Christie's disputes virtually every fact that I discuss on this issue. Per *Goldman v. Bequai*, 19 F.3d 666, 672 (D.C. Cir. 1994):

> As a general matter, "what a plaintiff knew and when [she] knew it, in the context of a statute of limitations defense, are questions of fact for the jury"....[U]nder District of Columbia law, "summary judgment is not appropriate in a case applying the discovery rule if there is a genuine issue of material fact as to when,

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[87] *See, e.g., Ezra Co. v. Psychiatric Institute Of D.C.*, 687 A.2d 587, 590, 591 (D.C. 1996).

[88] *See Doe v. Yogi*, 652 F. Supp. 203, 209 (D. D.C. 1986): In all but the "most exceptional cases", this is a question best left to the trier of fact. *See Grigsby v. Sterling Drug, Inc.*, 428 F. Supp. 242, 243 (D. D.C. 1975), *aff'd*, 543 F.2d 417 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S.Ct. 2925, 53 L.Ed.2d 1063 (1977). In this case in particular the facts militate in favor of leaving this question for a jury (Emphasis added.)." *See also, Ezra, supra*, 687 A.2d 590, 593 indicating that a "fact-laden" inquiry required reversal of a summary judgment. Per *Williams v. Central Money Co.*, 974 F. Supp. 22, 26 (D. D.C. 1997):"[F]act-bound issues could not be decided on a motion for summary judgment."

[89] *See, e.g., Arrington v. U.S., supra; Mazaleski v. Treusdell, supra; Tavoulareas v. Piro, supra; Hayes v. Shalala, supra; Pendarvis v. Xerox Corp., supra; Villines v. United Broth. Of Carpenters, supra.*

through the exercise of due diligence, the plaintiff knew or should have known of her injury. (Citations omitted).[90]

My evidence re my conversations with Maclean, Southern and Ludkin must be accepted as true.[91] Cases have denied or reversed summary judgments involving all of these legal doctrines cited previously, based on undisputed facts favoring plaintiff and/or disputed material facts. 92

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[90] *Byers v. Burleson,* 713 F.2d 856, 861 (D.C. Cir. 1983) held :"the movant must demonstrate entitlement [to a summary judgment] beyond a reasonable doubt and if an inference can be deduced from the facts whereby the nonmovant might recover, summary judgment is inappropriate (Emphasis added.)."

[91] As the Court noted (p. 8, Order), Maclean has no recollection of the conversation, except that Maclean made reference to my capacity as a litigator, which is an explicit acknowledgment of the predicate for Maclean's lulling statement suggesting that I write a letter asking Frödl to reverse his negative opinion and provide me with a positive opinion, that could permit Christie's to offer my painting for sale and resolve the dispute, short of litigation. Southern had only vague recollections of our conversation. I taped and had a transcript prepared of such conversation with Ludkin.

[92] *See,* e.g., *Williams v. Central Money Co.*, 974 F. Supp. 22 (D. D.C. 1997) (DCCPPA, §28-3901 *et seq.*, fraud; unconscionable contract actions involving discovery, due diligence and equitable tolling); *Kropinski v. World Plan Executive Council,* 853 F.2d 948, 955, 956 (D.C. Cir. 1988) (fraud action involving discovery, due diligence and lulling); *Interdonato v. Interdonato,* 521 A.2d 1124, 1135 (D.C. 1987) (fraud and breach of fiduciary duty actions involving equitable estoppel and lulling); *Goldman v. Bequai,* 19 F.3d 666, 673-674 (D.C. Cir. 1994) (fraud, breach of fiduciary duty, conversion and malpractice actions involving discovery, equitable tolling and estoppel and misrepresentation); *Jones v. Meridian Towers Apts.*, 816 F. Supp. 762, 768-771 (D. D.C. 1993) (RICO, fraud, and tortious interference actions involving fraudulent concealment, notice or knowledge of claims); *Ezra Co. supra*

Re accrual of causes of action[93] and the discovery doctrine, *East v. Graphic Arts Indus. Joint Pension Trust*, 718 A.2d 153, 157 (D.C. 1998) made clear the key elements of accrual.[94] *Ray v. Queen.*, 747 A.2d

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(breach of contract and interference actions involving discovery, estoppel, continuing tort); *Professional Ans. Serv. v. Chesapeake Tel.*, 565 A.2d 55, 66-67 (D.C. 1989) (fraud action involving equitable estoppel and continuing tort); *Bailey v. Greenberg*, 516 A.2d 934, 940 (D.C. 1986) (negligence action involving lulling, discovery and misrepresentation); *Farmer v. Mount Vernon Realty, Inc.*, 720 F. Supp. 223, 224 (D. D.C. 1989), aff'd, 983 F.2d 298 (D.C. Cir. 1993) (fraud, negligence, breach of fiduciary duty involving discovery, due diligence and accrual of a cause of action); *Doe v. Yogi, supra,* (fraud and emotional distress actions involving due diligence, accrual of fraud cause of action and lulling); *Hargraves v. Capital City Mortgage,* 140 F. Supp.2d 7, (D. D.C. 2000) (discriminatory lending, RICO, other statutory violations, civil rights violations unfair and deceptive lender practices, fraud, and breach of contract actions involving continuing violations).

[93] The general DC rule is that a claim for breach of contract accrues "when the contract is first breached." *Capitol Place I Assoc. L.P. v. George Hyman Constr. Co.*, 673 A.2d 194, 198 (D.C. 1996). However, *Burka v. Aetna Life Ins. Co.*, 56 F.3d 1509, 1513-1514 (D.C. Cir. 1995) held that, per the discovery doctrine, "where a breach is difficult to discover, the statute does not run until the injured party should have known of the breach." *See, e.g., Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1201-04 (D.C.App. 1984)" denied summary judgments on a statute of limitations defense, as there were disputed facts on this issue; *see also Kyriakopoulos v. George Washington University*, 866 F.2d 438, 442, 447-448 (D.C. Cir. 1989); *Material Supply Int'l v. Sunmatch Industrial*, 146 F.3d 983, 992 (D.C. Cir. 1998); *Prouty v. National R.R. Passenger Corp.*, 572 F. Supp. 200, 205 (D. D.C. 1983).

[94] "The accrual date for limitations purposes [is] the time when a plaintiff discovered or should have discovered all of the essential elements of a possible cause of action....Thus, "for a cause of action to accrue where the discovery rule is applicable, one must know or by the exercise of reasonable diligence should

1137, 1141-1142 (D.C. 2000) made clear that reasonable diligence is a highly fact bound inquiry, which is affected when a fiduciary relationship is involved, and explained the relevant principles.[95] The defendant has the burden of proof regarding the plaintiff's due diligence, including a case involving fraud and fraudulent concealment.[96] The plaintiff has a higher degree of knowledge than inquiry notice of the fraud that requires "something closer to actual notice than the merest inquiry notice."[97] *C & E*

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know (1) of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing." (Citations omitted; emphasis added.)."

[95] "The critical question in assessing the existence *vel non* of inquiry notice is whether the plaintiff exercised reasonable diligence under the circumstances in acting or failing to act on whatever information was available to him...."In all cases to which the discovery rule applies[,] the inquiry is highly fact-bound and requires an evaluation of all of the plaintiff's circumstances." *Id.* at 372. In determining whether the plaintiff exercised reasonable diligence, the court should consider, *inter alia*, whether there was a fiduciary relationship between the parties..... [T]he failure to use such diligence may be excused where there exists some relation of trust and confidence between the party committing the fraud and the party who is affected by it, rendering it the duty of the former to disclose to the latter the true state of the transaction, and where it appears that it was through confidence in the acts of the party who committed the fraud that the other was prevented from discovering it (Citations omitted; emphasis added.)."

[96] *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989).; *Hobson v. Wilson*, 737 F.2d 1, 37 & n. 13 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Richards v. Mileski*, 662 F.2d 65, 71 (D.C. Cir. 1981).

[97]: *Sprint Communications Co., L.P. v. F.C.C.*, 76 F.3d 1221, 1226 (D.C. Cir. 1996). *See also Richards v. Mileski*, *supra*, 662 F.2d at 71; *Riddell v. Riddell*, *supra*, 866 F.2d at 1491); *Firestone v. Firestone*, 76 F.3d 1205, 1209-1210 (D.C. Cir. 1996); *U.S. v. Bill Harbert International Construction, Inc.*,

Services, Inc. v. Ashland, Inc. 498 F. Supp.2d 242, 261-263 (D. D.C. 2007), a case, like this case, involving claims of breach of the implied covenant of good faith and fair dealing and breach of a fiduciary duty, under both of which theories, Christie's is clearly liable under established legal principles,[98] as well fraud and negligent misrepresentation, set forth the standards pertaining, *inter alia*, to the accrual of causes of action. It denied defendant summary judgment under the discovery doctrine.

Civil Action No. 95--1231 (RCL), Loislaw p. 9 (D. D.C. June 14, 2007).

[98] In *Greenwood v. Koven*, 880 Fed. Supp. 186, 198 (S. D. NY 1995), Christie's conceded that its consignment agreement was subject to an implied covenant of good faith and fair dealing. *See Paul v. Howard University*, 754 A.2d 297, 310 (D.C. 2000): "This court has held that all contracts contain an implied duty of good faith and fair dealing, which means that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Hais v. Smith*, 547 A.2d 986, 987 (D.C. 1988) (citation omitted). If a party to the contract evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, he or she may be liable for breach of the implied covenant of good faith and fair dealing. *Id.* at 987-988;" *Hoffman v. Hill and Knowlton, Inc.*, 777 F. Supp. 1003; (D. D.C. 1991). *See* the landmark auction case, *Cristallina S.A. v. Christie, Manson & Woods International, Inc.*, 502 N.Y.S. 2d 165, 171-172 (A. D. 1st Dept. 1986): "Christie's concedes, as it must, that an auction house acts as an agent on behalf of its consignors. The auctioneer is the agent of the consignor....As an agent, Christie's had a fiduciary duty to act in the utmost good faith and in the interest of Cristallina, its principal, throughout their relationship....When a breach of that duty occurs, the agent is liable for damages caused to the principal, whether the cause of action is based on contract....or negligence (Citations omitted: emphasis added.)."

Firestone v. Firestone, supra, 76 F.3d at 1209-1210, explained the relationship between accrual of a tort cause of action and fraudulent concealment and set forth the standards applicable to fraudulent concealment, which usually requires an affirmative act of concealment, but, in a case, such as this, Christie's silence as my fiduciary, is concealment, even though Christie's made affirmative fraudulent concealment statements. *R.D.H. Communications, Ltd. v. Winston,* 700 A.2d 766, 774 (D.C. 1997) held: "{T}he statute of limitations in cases of fraudulent concealment begins to run when the wrongdoing is discovered or when the representation is terminated, whichever is later. *Bailey v. Greenberg,* 516 A.2d 934, 941 (D.C. 1986)."[99] *Jones v. Meridian Towers Apartments, Inc., supra,* 816 F. Supp. at 768-771 discussed the relationship between accrual of cause of action, discovery, fraudulent concealment, lulling and self-concealing fraud and meticulously explained the findings a court had to make concerning what the jury could find in ruling on a summary judgment motion and denied summary judgment because there were undisputed material facts favoring plaintiff and disputed material facts.[100] As set forth in the factual,

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[99] In addition, the court noted the relationship between estoppel and fraudulent concealment and held: "If the party asserting the statute of limitations is found to have fraudulently concealed information needed to determine whether there is a basis for litigation, that party will be estopped from asserting the statute..... But for purposes of the statute of limitations, a cause of action for fraud does not accrue until the allegedly defrauded party knows or reasonably should have known a fraud has been committed (Citations omitted; emphasis added.)."

[100] At 816 F. Supp. at 770, the Court stated: "If a jury could find that defendants "'lulled' the plaintiff[s] into inaction" or that

evidentiary discussion, *infra*, it is clear that Christie's wrongs" in this case were specifically "designed to be self-concealing," and that Christie's took actions to "lull" me into not filing my lawsuit within the 3 year statute of limitations period.

Goldman v. Bequai, *supra*, at 19 F.3d at 672-675 denied defendant summary judgment based on disputed material facts, involving claims of, *inter alia*, fraud, breach of fiduciary duty, and malpractice involving discovery, equitable tolling and estoppel[101] and misrepresentation; discussed the relationships between misrepresentation and these doctrines; and held:

> [A] defendant is estopped from asserting the statute of limitations as a bar to plaintiff's action if he has done anything that would tend to lull the plaintiff into inaction and thereby permit the statutory limitation to run against him (Emphasis added.), which is a long-established principle of black letter law (Emphasis added.).[102]

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the wrongs themselves were designed to be self-concealing, then the Court must leave the issue of defendants' statute of limitations defense to the jury. *See Kropinski*, 853 F.2d at 957."

[101] *See* the court's holding regarding equitable estoppel at 19 F.3d at 672-673.

[102]This is a long-established, black letter principle of law. *See, e.g., Jankovic v. International Crisis Group*, 494 F.3d 1080, 1086 (D.C. Cir. 2007); *Smith-Haynie v. District Of Columbia*, 155 F.3d 575, 580 (D.C. Cir. 1998); *Kropinski v. World Plan Executive Council*, *supra*, 853 F.2d at 955; *Mondy v Secretary Of The Army*, 845 F.2d 1051, 1057 (D.C. Cir. 1988); *Alley v. Dodge Hotel*, 551 F.2d 442, 446-47 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 958 (1977); *Fontana v. Aetna Casualty & Surety Co.*, 363 F.2d 297, 299-300 (D.C. Cir. 1966); *Hornblower v. George Washington University*, 31 App. D.C. 64, 75 (1908);

Currier v. Radio Free Europe/Radio Liberty, Inc., 159 F.3d 1363, 1367 (D.C. Cir. 1998) distinguished between equitable estoppel and equitable tolling and discussed the differences.[103]

Perkins v. Nash, 697 F. Supp. 527, 533 (D. D.C. 1988), like this case,. involved claims of, *inter alia,* fraud, breach of fiduciary duty, violations of the CPPA, D.C. Code §28-3901 et seq.. Although *Perkins* granted defendant summary judgment, the court summarized the continuing tort doctrine:[104] *Rochon*

William J. Davis, Inc. v. Young, 412 A.2d 1187, 1192 (D.C. 1980).

[103] "Whereas equitable tolling allows a plaintiff to avoid the bar of the limitations period if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim,.... equitable estoppel in the statute of limitations context prevents a defendant from asserting untimeliness where the defendant has taken active steps to prevent the plaintiff from litigating in time...(Citations omitted)." *See Norman v. U.S.*, Civ. Action No. 04-1208 (EGS), Loislaw p. 7-8 (D. D.C. July 11, 2005); *Cristwell v. Veneman,* 224 F. Supp.2d 54, 58 (D. D.C. 2002).

[104] "The continuing tort doctrine constitutes a pretty well established exception to the usual rule that a statute of limitations starts to run at the time of injury.... Under this doctrine, plaintiff can bring his action against all of defendant's wrongful conduct, as long as any of it occurred during the limitation period.....In addition, it is intended to prevent a person from acquiring a right to continue to reap benefits from previous tortious conduct.... In particular, when a plaintiff is first adversely affected by a defendant, the statute of limitations begins running for his cause of action to recover all damages incurred by that date, as well as all provable damages that will flow in the future from the acts of defendant. *Zenith Radio Corp. v. Hazeltine Research,* 401 U.S. 321, 339, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1970) (Other citations omitted)." *See also, e.g., Whelan v. Abell,* 953 F.2d 663, 673 (D.C. Cir. 1992) (quoting *DeKine v. District of Columbia,* 422 A.2d 981, 988 n. 16 (D.C. 1980)); *Fontana v. Aetna Casualty & Surety Co.*,

v. F.B.I., 691 F. Supp. 1548, 1563-1564 (D. D.C. 1988) further amplifies the continuing tort doctrine:[105] *Lively v. Flexible Packaging Ass'n,* 765 A.2d 954, 962-963 (D.C. 2001) discussed principles pertaining to continuing violation of a statute.[106].

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supra, 363 F.2d at 299-300; *Beard v. Edmondson And Gallagher,* 790 A.2d 541, 547-548 (D.C. 2002); *Professional Ans. Serv. v. Chesapeake Tel., supra,* 565 A.2d at 66-67.

[105] "Under this 'continuing tort' doctrine, the statute of limitations does not start to run when a plaintiff knows or should have known about the defendants' actions...Rather, the cause of action accrues, and the limitations period begins to run, at the time the tortious conduct ceases.....[T]he theory applies even to a series of acts that are not inherently 'of a repetitive character' and even when a plaintiff was sufficiently aware of the harm caused to file an administrative complaint challenging the defendant's conduct....As such, the continuing tort theory applies to the common law torts alleged in this case, for the harms alleged by plaintiffs flow not from defendants' individual actions but from the cumulative and synergistic effect of defendants' allegedly wrongful conduct. (Citations omitted; emphasis added.)."

[106] "[A] plaintiff must show that the incidents both before and during the statutory period constitute a continuing course of conduct and are not discrete unrelated acts. *Id.* A continuing violation exists where there is a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the statutory period..... The continuing violation theory is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that her rights have been violated (Citations omitted)."An antitrust cause of action accrues and the limitation period commences each time a defendant commits an act that injures the plaintiffs business. (Citations omitted; emphasis added)" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321(1971); *See Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997); *Albritton v. Kantor*, 944 F. Supp. 966, 970-971 (D. D.C. 1996) and *see also, e.g., Bowdré v. Richardson*, 131 F. Supp.2d 179, 184-185 (D. D.C. 2001) and *Hargraves v. Capital*

With regard to a possible breach of a contract involving a continuing duty, which is the kind of duty arising from Christie's implied contract obligation of good faith and fair dealing and agent/fiduciary relationship with me, *Kyriakopoulos v. George Washington University*, 866 F.2d 438, 448 (D.C. Cir. 1989) remanded a grant of summary judgment to the district court to determine whether or not the plaintiff would have a cause of action for an independent breach of that continuing duty which occurred within the statute of limitations period.[107]

Because these legal principles were not applied by the Court and the Court's "discovery" analysis at pp. 15-18 of the Order is fatally flawed, the Courts findings are erroneous. The Court accepts (p. 11, Order) and does not dispute, as I do, the truth of the Ludkin letter in its entirety, and that she "reiterated" a rationale for Christie's being "unwilling to sell" my painting, because I declined to make shipping arrangements, etc..[108] It was the

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City Mortgage, supra, 140 F. Supp.2d at 19 , both denying summary judgment on this issue, because of disputed facts.

[107]. *See Long v. Howard University,* Civil Action No. 02-1374 (JDB), Loislaw pp.19-20. (D. D.C. 2006); *Jones v. Howard University*, 574 A.2d 1343, 1347-1348 (D.C. 1990); *Guilbert v Gardner*, 480 F.3d 140,150 (2nd Cir. 2007).

[108] If it were true that her withdrawal rationale were only "reiterations" of the rationale previously provided to me by Christie's officials in 1993-1994 for withdrawing my painting from sale and refusing subsequently to sell the painting, I was never injured by any Christie's action. All I had to do was to ship the painting to Frödl for his inspection and obtain a positive opinion of authenticity from Frödl, and Christie's would sell the painting. Thus, all of my causes of action never accrued, and I was and never put on inquiry or actual notice of causes of action against Christie's. Thus, no running of the statute of limitations, and I would not have a cause of action

Ludkin letter itself of July 11, 1994, that, in fact, made clear to me that facts existed that supported my above breaches and tortious conduct claims, because of Ludkin's patently false assertion of my denying to make arrangements for the painting to be shipped to Vienna for Frödl's inspection and opinion and her ignoring and, in effect, denying my allegations in the Poltimore letter that the 4 Christie's officials with whom I had dealt, Goldsmith, S-H, Maclean and Poltimore, had previously told me that Christie's had predicated their initial withdrawal of my painting and subsequent refusals to offer my painting for sale on Frödl's negative opinion on authenticity, with which Christie's concurred. When I read Ludkin's July 11, 1994 letter, I realized I had been injured by Christie's and was put on actual notice and realized that the facts supporting elements of the claims I made in this litigation for breaches of Christie's obligations as an agent/fiduciary to me and under its implied contractual obligations of good faith and fair dealing to me, and Christie's fraud or deceptive business practices or intentional inflict emotional distress claims (collectively, "my claims" or "my causes of action") existed.[109] Thus, arguably, the 3 year DC statute of limitations began to run when I read the Ludkin letter shortly after July 11, 1994.

However, prior to my obtaining and reading on March 21, 1994 of the translation of the Frödl letter to me of March 11, 1994, I had absolutely no knowledge of or notice that any material fact existed

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against Christie's today, as Christie's actions did not injure me. However, the Ludkin letter is an egregious fairy tale that, unfortunately and inexcusably, the Court bought as being true.

[109] I did not know of my remedies under the CPPA at this point.

to support a viable claim against Christie's, so as put me on inquiry notice to ascertain whether any such material facts existed. After reading the translation of the Frödl letter, I was on notice that it was possible that Christie's had been lying to me and had breached the above obligations and engaged in tortious conduct and that, in fact, Frödl had not provided Christie's with a negative opinion on authenticity that damaged the marketability and value of his Schindler painting. Thus, I had a duty to make inquiry, as of March 21, 1994. I filed my VC on March 21, 1997, complying with the "discovery" doctrine requirements, given D.C.'s applicable 3 year statute of limitations, even though I also knew that as of March 21, 1994, that any injury, damage or harm to the marketability and value of my painting as an authentic work by Schindler could be readily cured by Christie's agreeing to offer it for sale as an authentic work by Schindler and citing the Fuchs' Gutachten in the catalogue entry. I decided to approach Poltimore on March 23, 1994 on this basis, as Frödl had denied giving Christie's a negative opinion.

However, on March 21, 1994, I remained concerned that if Christie's officials had told me the truth, and Frödl was lying and/or Christie's officials still believed that the painting was not authentic and a fake or had lingering doubts about the painting's authenticity and would not offer it for sale, thus, the marketability and value of my painting had not been damaged by Christie's. As I did not know whether Frödl or Christie's was telling

the truth (VC, ¶¶ 271, 272, 275, 284, 285,[110] 294) and in order to see if he could, as suggested above, persuade Christie's to offer his painting for sale as an authentic Schindler,. and after studying pertinent documents, including my notes of my 1993 conversations with the Christie's officials, I called Poltimore on March 23, 1994 and had an extended conversation with him (VC ¶¶ 272-323). Poltimore, in essence, called Frödl a liar for what Frödl had said in ¶ 3 of such March 11 letter, and reiterated what Goldsmith, S-H and Maclean had told me was the truth, that Frödl had, in fact, provided Christie's such negative opinion on authenticity,[111] which caused Christie's to withdraw the painting. Thus, Poltimore left me with no real predicate for a viable cause of action against Christie's. Poltimore verbally battled with me and refused to discuss meaningfully with me on the telephone any settlement. Thus, assuming, as the Court did, that the rationale provided by Ludkin in her July 11, 1994 letter to me was true or there was another rationale, Poltimore continued the ongoing tortious conduct and breach of Christie's obligations to me as an agent/ fiduciary and its implied contractual obligation of good faith and fair dealing and was engaged in fraudulent concealment of Christie's true reasons for taking their adverse actions against me and my painting.

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[110] *See, e.g.,* VC, ¶ 285, in which I stated, in part: "Fastov made clear that he merely wanted to deal with this matter as a practical businessman and solve this problem quickly and informally with Poltimore as two businessmen should. So, he did not want to get into a debate about who was or was not telling a particular truth or who did what or did not do what."

[111] *See* V. C. ¶¶ 278, 282, 284, 286, 288, 291, 293, 297, 299, 305, 312, 313.

When Poltimore would not agree to a telephonic settlement of this matter (VC, ¶¶ 272-301), I raised the possibility of a law suit (VC, ¶¶ 302-304, 306), if Poltimore and I could not settle this matter on the phone. Poltimore lulled me into not filing litigation by insisting that I put my views on resolving this matter in writing to him, and that he or Christie's solicitors would read and respond to such views.[112] Thus, Poltimore fraudulently "lulled" me into foregoing my litigation option on March 23, 1994, which extended my statute of limitations deadline until March 23, 1997. I filed my Verified Complaint

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[112] *See* ¶ 31, Poltimore declaration (Ex., apparently unnumbered, Biester Dec.) Poltimore rejected my offer to discuss this problem with Christie's solicitors directly (VC, ¶¶ 306-307) and suggested that I put my views to him in writing.(VC ¶¶ 305-306, 309, 313). To induce me to write such lengthy, burdensome letter, Poltimore committed to "trying to read" my written views and that he or Christie's solicitors would "read and give very careful consideration to whatever Fastov's chose to submit in writing" and that there would be a Christie's response to such written views. (VC ¶¶ 320, 323) Poltimore persisted in this position, observing that "he would prefer that Fastov not initiate litigation and reiterated his view that Fastov either take the painting back or submit his views to Poltimore in writing," (VC, ¶ 319), even though I advised him that writing such views would be extremely energy and time-consuming and burdensome for me, and that I had already expended a lot of time and energy on this matter and "had experienced a great deal of anxiety, frustration, cold sweats, even nightmares and other physical effects this past year" because of this matter. (VC, ¶¶ 310, 312, 314, 316, 318). As of the completion of my Poltimore letter, I had expended since April 1, 1993 over $3,600 in out of pocket expenses and 592.5 hours of my time to resolve this matter and had suffered mental and physical distress (VC, ¶ 328).

on March 21, 1997.[113] The foregoing, also demonstrates that I pursued with due diligence my efforts to achieve settlement and to ascertain Poltimore's views on Frödl's statements in his March 11, 1994 letter, and that I diligently responded to Poltimore's "lulling" offer by transmitting the lengthy letter and settlement proposals in my Poltimore letter of July 2, 1994.[114]

After asserting that my contract claim was "untimely," the Court asserted at p. 16 of the Order

> The court is not convinced otherwise by Fastov's fanciful assertion that he had no reason to know about CMW's alleged breaches until March 21, 1994, exactly three years before he filed suit. On that date, Fastov allegedly obtained a translation of Frodl's letter dated March 11, 1994. In that letter, Frödl advised Fastov that he (Frodl) had never informed CMW or anyone else, that Fastov's painting was a fake. Insisting that CMW told him that his painting was pulled from the auction because Frodl had said it was a fake, Fastov maintains that there would have been no breach of contract had the painting had been a fake. It follows, according to Fastov, that his contract

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[113] I knew that, based on a conservative analysis of statute of limitations law, that it was best to file by March 21, 1997, because it was 3 years from March 21, 1994, the date I read the translation of the Frödl letter to me of March 21, 1994, which put me on inquiry notice, rather than to avail myself of a later date under lulling and other doctrines. This decision was based on . pp. 277-355 of my Quasi-Memorandum Of Points And Authorities, that was sent with my 5 letter to the Christie's officials on May 13, 19997. See RSF Dec, ¶52.

[114] *See* fn. 10, *supra*. for the contents and nature of such letter and its attachments.

action did not arise until he learned that CMW had been systematically lying to him about the approach to Frodl and about the authenticity of the painting. Doc. 90 at 29. It was only then, he says, that he had reason to believe that Christie's breached its oral agreement (Emphasis added.)

The Court's analysis is irrelevant and manifests improper credibility assessments by the Court,115 as to whether or not I failed to comply with the "discovery doctrine's" requirements pertaining to inquiry and notice. There was as of April 1-2, 1993, no material breach of the "alleged" (p. 17, Order) oral agreement and was entered into by Goldsmith and me (VC, ¶¶ 19-24, 30-37), including Christie's breach of its implied obligation of good faith and fair dealing or as my agent/fiduciary,[116] given that it was Frödl's negative opinion that caused Christie's to withdraw the painting from sale. The Court's conclusion (last sentence of such p. 17 paragraph) does not point to a

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[115] The Court's use of the terms "allegedly" and "fanciful assertion" indicate that the Court was predicating his decision, in part on a determination as to my credibility, which the Court is barred from doing in ruling on a summary judgment motion.

[116] The Court's skepticism (*see* p. 17, Order, referring to the "alleged oral agreement") as to my insistence upon and obtaining an oral agreement, with regard to painting,, which I believed to be worth in excess of $100,000 and my most valuable art asset, prior to shipping and consigning the Schindler painting to Christie's in England, and the existence of such agreement is a reflection of the Court's ignorance of the actual practices regarding art and auction transactions of this nature. Such oral agreements were made all the time and were often reduced subsequently to writing, which was executed by the consignor and the auction house. Christie's never executed the Receipt agreement with me, the consignor, regarding such Schindler painting. *See* VC, ¶¶ 197, 201; Ex. 61, Fastov Memo; RSF Dec., ¶ 51.

specific breach of the oral agreement. My cause of action did not begin to accrue and I was not put on requisite notice and inquiry, until I read the translation of the Frödl letter to me on March 21, 1994; thus, my filing of the VC on March 21, 1997 was timely.

I most certainly and very reasonably did not perceive Christie's Frödl negative opinion–based withdrawal decision as a breach of Christie's obligations as an agent/fiduciary to me or of good faith and fair dealing under the oral contract.[117] I had no reason to believe Christie's had lied to me, had been deceptive, breached its contact obligations

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[117] When I was told of the Frödl negative opinion–based withdrawal decision by Goldsmith and S-H on April 1-2, 1993, I knew that all auction houses had a right to withdraw a painting from sale, if they determined that it was not authentic and/or it was a fake, and no court should and would rule in my favor in a suit by me to compel Christie's to offer the painting for sale as an authentic Schindler, and I did not even contemplate such a suit, even though I believed that my Schindler painting was authentic and Frödl was wrong, A key consideration affecting the reasonability of this conclusion was that I had been just been told this bad news by Christie's, one of the two (the other being Sotheby's) of the largest and most prestigious, respected and venerable art auction houses, which had a reputation for high professionalism, experience and integrity, and Frödl, who was the Direktor of the Österreichische Galerie, the largest and most significant Austrian museum dedicated to 19th Century Austrian art and who had previously been the head of the art department of this museum, which had a relatively large collection of Schindler paintings, had changed his mind about the authenticity of my painting and had recently opined to Christie's that my painting was not authentic and was a fake. Per fn. 27, *supra*, I was aware that Frödl, as of June 15, 1986, had provided me with a non-binding positive opinion on authenticity, but had observed that there were some atypical elements in my painting.

or its agent/fiduciary obligations to me or inflicted emotional distress. "[A] reasonable person has every right to believe that persons of 'high integrity' will carry out their contracts,"[118] and "the persons with whom he deals are not in default of their obligations to him."[119] I did not have to deal with Christie's "as if [I] were dealing with thieves."[120] I had other crucial concerns as of April 2, 1993,.[121] resurrecting the

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[118] *Professional Ans. Serv. v. Chesapeake Tel., supra,* 565 A.2d at 66-67; *Fishman v. Estrin,* 501 F. Supp. 208, 211 (D. D.C. 1980).

[119] *Sprint Communications Co. v. FCC, supra,* 76 F.3d at 1226-1227.

[120] *Richards v. Mileski, supra,* 662 F.2d at 72; *Hobson v. Wilson, supra,* 737 F.2d at 39; *Filloramo v. Johnston, Lemon & Co.,* 700 F. Supp. 572, 578 (D. D.C. 1988); *Doe v. Yogi, supra,* 652 F. Supp. at 207;. *Hudak v. Economic Research Analysts,* 499 F.2d 996, 1002 (5th Cir. 1974) *cert. denied,* 419 U.S. 1122, (1975).

[121] Not only did I think that I did not have any cause of action against Christie's, I was concerned that I could face a claim from Christie's on the basis that I had engaged in fraud and breached my obligation of good faith and fair dealing to Christie's for consigning to Christie's a painting, which, according to both Frödl and Christie's, was not authentic and was a fake, but which I had told Christie's was an authentic work by Schindler and that my painting "was a pretty valuable consignment that would bring a good price; and thus, yield CL a good commission and buyer's premium," when I sought to induce and successfully induced Christie's to enter into an oral consignment agreement with me (VC, ¶¶ 11, 13, 15, 17, 19). My concern was reflected n my conversations with Goldsmith and S-H of April 1 and 2, 1993 and in my letter to Goldsmith of April 10, 1993, where I explicitly asserted my bona fides to persuade Goldsmith that I had not consigned a fake painting to Christie's (VC, ¶¶ 160, 162, 182 and 190) and to S-H (VC, ¶ 182). I also told Goldsmith on April 2, 1993, that I "wanted Goldsmith to know and believe [I] had always acted in good faith toward her and CL (CMW), and [I] wanted to make sure

authenticity of my painting from the disastrous effect of the Frödl negative opinion.

I made clear to Goldsmith and S-H that Frödl had made a mistake; my intent to overcome the effects of the Frödl negative opinion by resurrecting the authenticity of my painting; to continue to hold my painting on consignment and to await further instructions, including shipping instructions, for a possible Christie's sale of my painting as an authentic Schindler in the future, to which Christie's agreed.[122] Goldsmith told me that she "understood

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that she knew that what [I] had told her previously was true and correct and that [I] had not intended to consign a fake painting to CL.(VC, ¶ 190) On p. 1 of my letter to Goldsmith, "Fastov indicates that he is enclosing copies of such Frödl letter/opinion to Fastov of June 15, 1986 and two English translations thereof as enclosures 2) and 3), and, shortly thereafter, stated: "I sent you items 2) and 3), so that your records would be complete with respect to my bona fides in this matter." On p. 6, in closing this letter: "I have put these thoughts down to you to make clear: 1) my good faith when I sent the painting to you..." *See* VC, ¶ 207. Moreover, such a Christie's claim could be asserted as a counterclaim in any action I brought against Christie's at that time, which, for the reasons I have previously discussed, I was not aware of or contemplating. I could also be exposed to liability, if I successfully pressured Christie's into selling my painting as an authentic Schindler work, with Christie's knowledge of Frödl's negative opinion.

[122] *See* VC, ¶¶ 120-170, re my April 1, 1993 conversations with Goldsmith, VC ¶¶ 171-183 and ¶¶ 184-190, re my April 2, 1993 conversations with Dr. S-H and Goldsmith, respectively; and VC ¶¶ 202-212 re my April 10, 1993 letter to Goldsmith. *See also* ¶ 12, Goldsmith declaration, Ex. 46, RSF Memo, ¶ 17, and Goldsmith declaration, April__2000, Ex., apparently unnumbered, Biester Dec., n which, in effect, she admitted that Christie's retained my painting on consignment until "summer of 1997," when I requested its return. I made this request

Fastov's objectives, would abide by his wishes and await his instructions" and S-H gave me similar assurances and stated she would assist me."[123] I had no reason to disbelieve Christie's good faith, and that Christie's would continue to deal fairly with me, if I could resurrect the painting's authenticity, which would probably cause Christie's to offer it for sale as an authentic work. Thus, the April 1-2, 1993 conversations with Christie's officials did not put me on inquiry notice, and I reasonably perceived that I had no need to so inquire, as to a factual basis supporting the elements of any cause of predicated on the claims I made in this litigation.

My previous discussion and the following analysis demonstrates that Christie's engaged in fraudulent concealment and lulling actions, which precluded me from becoming aware of the factual bases for the elements of my claims against Christie's; I exercised due diligence; Christie's engaged in continuing torts and breaches; and I am entitled to the benefits of the equitable tolling doctrine. As previously recounted, both Goldsmith and S-H engaged in fraud and fraudulent concealment and breached Christie's obligations to me on April 1-2, 1993, asserting a

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because the 3 Christie's chairmen had opted not to settle this matter and to force litigation. *See* RSF Dec., ¶ 36.

[123] *See* VC, ¶ 183: "Dr. S-H stated that she would do her best to honor Fastov's requests and again expressed regret that Frödl had let both Fastov and Dr. S-H down" and *see* VC, ¶¶ 171-183. Goldsmith manifested her agreement with me when she kept the painting in London on consignment and sent me a note that I received on April 20, 1993 enclosing a color transparency/ektachrome of my Schindler painting that I had requested in my conversations with and letter to Goldsmith to assist me in my resurrection of the authenticity of my painting. (VC, ¶¶ 213-215). *See* RSF Dec., ¶ 36.

Frödl negative opinion on authenticity, which Frödl denies having provided, as the predicate for the Christie's withdrawal decision. I acted with diligence in writing Goldsmith on April 10, 1993, making clear that I believed that Christie's had withdrawn the painting from sale because of the Frödl negative opinion, and that I was going to attempt to overcome the effects of such negative opinion (Ex. 5, RSF Response, Att. B; VC, ¶¶ 202-212). I chose to write Fuchs for a certificate/letter of authenticity on May 1, 1993 (VC, ¶¶ 216-220), and Fuchs gave me such a letter/certificate of authenticity (Gutachten) dated June 15, 1993, which I received in early November 1993, because of US Postal Service snafus (VC, ¶¶ 221-224). Thus, I called and had a conversation with Maclean on November 5, 1993 (VC, ¶¶ 225-257). Maclean engaged in lulling, fraudulent concealment, fraud and a continuing torts and breaches. Maclean reiterated the Frödl negative opinion withdrawal rationale (VC, ¶¶ 238, 240-242, 245) to justify his refusal to offer my painting for sale as an authentic Schindler based on the Fuchs Gutachten[124]., as I had suggested, and insisted Christie's would have to disclose the Frödl negative opinion, which would "kill the sale of the painting or chill the bidding to the point that the painting would bring virtually nothing at the sale"(VC, ¶ 238). He insisted that I write a letter to Frödl, which he knew was unnecessary and burdensome and harmful to me[125]

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[124] This was an unqualified positive opinion on the authenticity of my Schindler painting of June 15, 1993, that I did not receive because of US Postal Service snafus until early November 1993 (VC, ¶ 221).

[125] Maclean knew that this would be a very complex, difficult and burdensome task for me with slim prospects of success

and would require a sophisticated, complex art analysis of the Schindler painting and Schindler's oeuvre to get Frödl to reverse his negative opinion and provide me and Christie's with a positive opinion on the painting's authenticity. Maclean stated that if my letter to Frödl caused Frödl to reverse his position and provide a new, unqualified positive opinion, Christie's might offer the painting for sale (VC, ¶ 242). In response to and reliance on Maclean's "lulling" representations, I prepared sent a letter and artistic analysis in Attachment A thereto to Frödl on January 19, 1994 (50 pages in the aggregate; VC, ¶¶ 258-263, Ex. 7. RSF Response, Att. B), to which Frödl responded with his letter of March 11, 1994, a translation of which I read on March 21, 1994 and caused me to call Poltimore on March 23, 1994. In such conversation, Poltimore continued the fraud based on the Frödl "not authentic and a fake" negative opinion and engaged in "fraudulent concealment" and "lulling" by requesting I put my views in writing to dissuade me from filing suit.[126] In reliance thereon, I prepared the Poltimore letter of July 2, 1994,[127] which began with: "I am writing to you pursuant to our telephone conversation of March 23, 1994 in an attempt to

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(VC, ¶¶ 242-246, 248-251),.and that I had experienced significant physical and emotional distress and would continue to experience these problems and symptoms (VC ¶¶ 253-254).

[126] Poltimore had intentionally lulled me into not filing suit, and that I responded to his lulling by writing him as he requested. *See* pp. 31- 32, *supra*. *See* RSF Dec., ¶ 19 for relevant excerpts from Poltimore Dep. pp. 163-164, 178-180; Ex. 4, RSF Memo; Ex. 4, RSF Surreply.

[127] *See* fn. 10, *supra*, for the contents and nature of such letter and its attachments.

persuade you to accept a compromise settlement proposal to resolve a claim I have against Christie's."

The Ludkin letter of July 11, 1994, responding to my Poltimore letter, was an egregious fraud and attempt at fraudulent concealment. Ludkin engaged in the ultimate Christie's stall, stonewall, cover-up, fraudulent concealment and lulling effort in the 7 telephone calls I placed to her on August 17-19, 1994 (VC, ¶¶ 367-373). On August 18, 1994, Ludkin's misrepresented to me,[128] that she was Johanna Hall, Ludkin's subordinate, and, with full knowledge that I was contemplating filing litigation against Christie's, insisted 7 times that I must put my views in writing to Ludkin./Hall.[129] Thus, Ludkin fraudulently "lulled" me into foregoing litigation on August 18, 1994, which extended my statute of limitations filing deadline until August 18, 1997. On August 19, 1994, I called Christie's Graham Southern, (VC, 374-415) with whom I had previous had good dealings, who lulled me into not filing suit. *See* RSF, Dec., ¶ 53. Christie's statute of limitations defense is clearly barred under all of the foregoing legal doctrines.[130]

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[128] *See* transcript of this tape recorded conversation (Ex. 13, RSF Surreply).

[129] Ludkin/Hall made other misrepresentations in this conversation knowing that my effort to "put it in writing" would be very costly and burdensome for me and would entail my writing the very lengthy settlement letters to the 3 Christie's chairmen with extensive attachments, such as those I ultimately produced on May 13, 1997, which were ignored by them. *See* pp. 6, 19, *supra*, and VC, ¶¶ 368-372, 421.

[130] Under the facts, as recited at pp.8-22, 29-37, *supra*, with regard to my conversations with Goldsmith and S-H of April 1, 1993, Maclean on November 5, 1993, Poltimore on March 23, 1994, Ludkin, misrepresenting herself as Hall, on August

IV. The Court's DC Consumer Protection Procedures Act ("CPPA") findings and analysis were erroneous.

At pp. 19-21, Order, the Court fell hook, line and sinker for Christie's legally and factually flawed "horse and buggy" era argument, that the CPPA does not reach the activities of a Christie's organization defendant in this matter, CMW, that damaged me, a resident of District of Columbia ("DC"), based on Christie's assertion that CMW's (unfair and deceptive) practices "took place in England;" and thus, CPPA should not be given extraterritorial effect against Christie's business practices that took place outside of DC, but adversely impacted on me. The Court's findings and conclusions are egregious from a policy standpoint and have no relevance to and afford no protection to a DC consumer in a global economy in which foreign corporations are selling products and services to residents of DC and the long-standing and large amount of US interstate commerce, (including its

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18,1994 and Southern of August 19, 1994 and the Ludkin letter of July 2, 1994, Christie's engaged in fraudulent concealment, lulling, continuing torts, continuing breaches of Christie's fiduciary duties and consignment contract obligations of good faith and fair dealing with me and continuing violations of the CPPA, DC Code § 28-3901 et seq., the DC statute barring unfair and deceptive business practices. Thus, Christie's is equitably estopped from asserting the statute of limitations defense. Moreover, I was not put on inquiry notice until March 21, 1994, when I read the translation of Frödl's letter to me of March 11, 1994. Finally, given my diligent efforts to understand and overcome the Christie's self-concealing fraud. I am entitled to relief under the equitable tolling doctrine. Hence, my filing of the Verified Complaint in this matter on March. 21, 1997 is not barred by the DC 3 year statute of limitations

recent explosion via Internet purchases from other states, as well as foreign countries), which also affects consumers of DC and across the US. Without the CPPA protections and enforcement mechanisms, including lawsuits, DC residents have no cost-effective and efficient protection against unfair and deceptive business practices by corporations residing outside DC.[131]) This has been recognized by the DC courts that have dealt with the same problem and resolved it in my favor, of which the Court was ignorant or chose to ignore.

Judge Friedman, relying on *Williams v. Central Money Co.*,,974 F. Supp. 22, 27 (D. D.C. 1997) issued a memorandum and order of February 27, 1998, denying Christie's motion to dismiss based on this argument.[132] Courts other than Judge Friedman,

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[131] *See* the Court's conclusion on p. 21, Order, that "when he signed and returned the Receipt sent to him by CMW' from London, he accepted CMW's Conditions of Business, including the provision stating that English law and jurisdiction would govern all matters relating to Fastov's consignment (Emphasis added.)" is factually disputed and legally incorrect, for among other reasons, I amended and executed the Receipt after Christie's had withdrawn the painting from sale. Re the Schindler painting I amended the Receipt to read: "Do not sell. Hold till further instructions & agreement (Emphasis added.),". which reflected my conversation with Goldsmith of April 1-2, 1993. Most importantly, Christie's never executed the Receipt contract in the space provided. *See* Ex. 61, RSF Memo. My contract with Christie's regarding the Schindler painting was oral. *See* VC, ¶¶ 19-24, 28, 35.

[132] Judge Friedman stated, *inter alia*: "[D]efendants claim that the [CPPA] does not apply to this transaction because the negotiations that led to the oral contract took place over the phone and defendants' allegedly tortious conduct took place in London. Mr. Fastov, however, was in the District of Columbia when he allegedly entered this transaction, and the painting at issue is located in the District of Columbia. In addition, Mr.

including the US Circuit Court of Appeals for the District of Columbia, have rejected the argument that extraterritorial conduct is insulated from the reach of the CPPA. For example, in *Wiggins v. Avco Fin. Services,* 62 F.Supp.2d 90, 98 (D. D.C. 1999), the court rejected the argument that the Act does not apply to an out-of-state transaction that has an allegedly harmful impact on a District resident, or involves property within the District. In so doing, the *Wiggins* court relied on *Williams v. Central Money Co.,* 974 F. Supp. 22, 27[133] (D. D.C. 1997), *aff'd and*

Fastov has alleged that one of the defendants, Christie's International PLC, has an office in Georgetown and that he dealt with persons in that office in making his decision to use Christie's consignment services. *See* First Amended Complain at ¶¶ 5, 14. Under the circumstances, Mr. Fastov has alleged sufficient facts to sustain his claim under D.C. Code § 28-3901. See Williams v. Central Money Co., 974 F. Supp. 22, 27 (D. D.C. 1997)." The facts cited by Judge Friedman have not changed, are undisputed by Christie's and are virtually the same as recited by the Court on p. 21, Order. Thus, the Court should have followed Judge Friedman's Order. See Argument RSF Supp.

[133] In *Williams* the district court had held the Act applicable where a transaction in Virginia damaged a D.C. resident. At 974 F.Supp. at 27, the Court held: "The purposes of the CPPA are to "assure that a just mechanism exists to remedy all improper trade practices [and to] promote, through effective enforcement, fair business practices throughout the community . . ." D.C. Code § 28-3901(b). If the CPPA did not apply to cases like this one, loan and mortgage companies could defeat those statutory purposes and evade D.C. consumer protection laws by locating themselves just across the District line from the D.C. citizens they seek as customers. The District of Columbia's substantial interest in protecting its citizens from predatory and fraudulent business practices is furthered by applying the CPPA to business transactions, such as the one in this case, that are formally consummated outside D.C. but that

remanded,176 F.3d 497, 499 (D.C. Cir. 1999) in which the Court observed, in a case under the CPPA involving an out-of-state transaction, that the District of Columbia clearly has "an interest in protecting its citizens from predatory loan practices," even if the practices occur elsewhere, 176 F.3d at 499. [134] *Shaw v. Marriott International, Inc.*, Civil Action No. 05-1138 (GK), Loislaw pp. 12-13, 18-20

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have a substantial impact on consumers who reside and property that is located in the District. (Emphasis added.)."

[134] "[First Government, the defendant] first argues that the district court should have applied Maryland law instead of the D.C. consumer protection statute because First Government is not a D.C. corporation, its offices are located in Maryland, the meetings with Williams took place in Maryland, and the loan payments went to a Maryland address.... "Where each state would have an interest in application of its own law to the facts . . . the law of the jurisdiction with the stronger interest will apply."... "If the interests of the two jurisdictions in the application of their law are equally weighty, the law of the forum will be applied."...Maryland no doubt has an interest in ensuring that lenders behave fairly, and the loan transaction in this case did have contacts with Maryland. But the District of Columbia likewise has an interest in protecting its citizens from predatory loan practices, and the transaction also had significant contacts with the District. Without deciding which jurisdiction's policy interests are stronger, we have no hesitation concluding that on the facts of this case the District's interests are at least as strong as Maryland's — a conclusion that compels the application of D.C. law..... As the district court explained, "by issuing a loan to a D.C. resident and taking his D.C. home as collateral," First Government "availed [itself] of, and subjected [itself] to, the consumer protection laws of the District of Columbia." Williams I, 974 F.Supp. at 27. "If the CPPA did not apply to cases like this one," said the district court, "loan and mortgage companies could . . . evade D.C. consumer protection laws by locating themselves just across the District line from the D.C. citizens they seek as customers." *Id* (Other citations omitted; emphasis added.)."

(D. D.C. 2-22-2007) reviewed these cases and *Washkoviak v. Student Loan Marketing Ass'n,* 900 A.2d 168 (D.C. 2006) and gave the CPPA extraterritorial effect.[135]

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[135] (At 12-13) "Marriott contends that the CPPA does not apply outside of the District of Columbia. Because Plaintiffs and their claims are not sufficiently connected with the District of Columbia, it argues, the CPPA is not applicable in this case. "The Consumer Protection Procedures Act is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers." *Atwater v. District of Columbia Dep't of Consumer & Reg. Affairs,* 566 A.2d 462, 465 (D.C. 1989). It is, "an ambitious piece of legislation which seeks to prohibit a long list of `unlawful trade practices.'" *DeBerry v. First Gov't Mortg. & Investors Corp.,* 170 F.3d 1105, 1108 (D.C. Cir. 1999) *(citing Howard v. Riggs National Bank,* 432 A.2d 701, 708 (D.C. 1981). "The purposes of the CPPA are to `assure that a just mechanism exists to remedy all improper trade practices [and to] promote, through effective enforcement, fair business practices throughout the community. . . .'" *Williams v. Central Money Co.,* 974 F. Supp. 22, 27 (D. D.C. 1997), (citing D.C. Code § 28-3901(b). As the statute itself states, it "shall be construed and applied liberally to promote its purpose." D.C. CODE § 28-3901(c) (Emphasis added.)."

(At 18-20) "[C]ourts in the District of Columbia have already concluded that its policies are advanced by application of the CPPA to cases involving non-District of Columbia consumers, merchants, and transactions. In *Williams v. First Gov't,* 176 F.3d at 499, our Court of Appeals upheld application of the CPPA to a claim by a District of Columbia resident against a Maryland mortgage company arising out of a transaction that occurred in Maryland. It concluded that Maryland had a policy interest in ensuring that lenders behave fairly, and the District of Columbia had an interest in protecting its citizens from predatory loan practices. *Id.*...Our Court of Appeals agreed with the district court that defendants should not be allowed to evade District of Columbia consumer protection laws simply by locating themselves across the District line from the citizens they seek as customers. *Id.* In *Washkoviak,* the District of

The Court's fact finding, upon which he predicated his erroneous legal determinations, in the first full paragraph on p. 21 erroneously concluded that it was I who initially contacted CMW ("It was Fastov who approached CMW in London, not the reverse.") and observed that I engaged in all the consignment agreement negotiations and implementation with CMW. The Court Order ignored these key facts:[136] (1) Christie's International PLC, the holding company, ("CI"),,and Christie's, Inc., the Christie's New York based affiliate ("CNY"), both defendants in this litigation, solicited my consignment through a Christie's organization magazine, published by CI, and Christie's organization solicitation brochures of

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Columbia Court of Appeals applied the CPPA to a putative class action by two named Wisconsin plaintiffs against Sallie Mae, a banking corporation with its principal office in the District of Columbia. 900 A.2d at 177. The loans out of which the plaintiffs' claims arose were entered into and serviced outside of the District of Columbia. *Id.* As in this case, the plaintiffs in *Washkoviak* claimed that "the deceptive and unfair policies and practices at issue in this case were formulated and conceived by Sallie Mae in the District of Columbia, were directed by Sallie [sic] from the District of Columbia, and emanated from Sallie Mae in the District of Columbia." *Id.* at 175.....Wisconsin had an interest in protecting its residents, and the District of Columbia had an interest in ensuring that its corporate citizens refrain from fraudulent activities. *Id.* at 181. Accordingly, the court applied the law of the District of Columbia, the forum state. *Id.* at 182. The District of Columbia has an even greater interest in applying its law to this case than it did in *Washkoviak*, where no plaintiffs had connections with this jurisdiction. For all these reasons, the Court concludes that at this stage in the proceedings Plaintiff has alleged a claim under the CPPA. Accordingly, Marriott's motion to dismiss the CPPA claim (Count II) is denied (Emphasis added.)."

[136] *See* VC, ¶¶ 7-11, 13, 25.

late 1992, early 1993, in which they fraudulently touted the Christie's organization's expertise, integrity and skills with respect to the researching, evaluating, cataloguing, promotion, offering and sale of Austrian and German works of art, including, but not limited to 19th Century Austrian art, to induce me fraudulently[137] to consign to the GA sale of May 20, 1993, to be conducted by CMW; (2) CI had in 1993 and still has a business office in Georgetown, DC, with which I consulted and received guidance concerning my possible consignment to CMW of the Schindler painting prior to writing CMW about the consignment; (3) In reliance on such solicitations and misrepresentations and the guidance I received from CI's office, I wrote CMW regarding the possible consignment on February 11, 1993 and was called by Goldsmith on February 18, 1993 and on February 24, 1993, in which she told me that she had discussed the Schindler with her colleagues in CMW and CNY and they had decided that the pre-sale estimates in the catalogue entry for the Schindler painting should be £40,000-£60,000, not the £50,000-£70,000 she had provided me on February 18, 1993. As previously noted, fn. 123, *supra*, these are the same facts with which Judge Friedman was

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[137] *See* RSF Dec, ¶ 42, which is an excerpt from Goldsmith's deposition, in which she answered the question as to whether the Christie's officials "didn't feel [they] were sufficiently qualified to satisfy the customers, or on the other hand are you saying that you didn't feel sufficiently qualified to make a judgement about its authenticity" with regard to my Schindler painting.," by responding "Both." Thus, she admitted that Christie's was incompetent, and that Christie's had committed fraud when Christie's represented that they were competent to deal with a major Austrian artist.

confronted and are undisputed. Thus, the Court should have followed Judge Friedman's Order.

V. The Court's damages analysis and findings were erroneous.

At pp. 22-24, Order, the Court does not cite and tramples upon any Black Letter law summary judgment principles, which are also applicable to the issue of proximate causation of damages, about which the Court's Christie's-based facts and inferences drawn therefrom, credibility-based, speculative and ignorant findings are predicated.[138] The Court betrays ignorance of the ethical obligations and practical impacts on marketability and value in the art market in attempting to sell a

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[138]*Per McCoy v. Quadrangle Dev. Corp.*, 470 A.2d 1256, 1259 (D.C. 1983):" It is basic law that the proximate cause of an injury is ordinarily a question of fact for the jury. Only if there were absolutely no facts or circumstances from which a jury could reasonably [find that FNB breached a contract to send the funds conditionally], would the question have been one for the court. But if, as here, the facts are such as to cause reasonable men to differ, then the question is clearly one for the determination of the jury. (Citation omitted; emphasis added.);" *Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley*, 999 F. Supp. 34, 53 (D. D.C. 1998). I have shown that there is evidence which, when viewed "in the light most favorable to [me]," would entitle a reasonable juror to conclude that Christie's actions more likely than not caused diminution in the value of the Schindler painting. Per *Aka v. Washington Hosp. Ctr.*, 332 U.S. App. D.C. 256, 156 F.3d 1284, 1288 (D.C. Cir. 1998). Otherwise put, Christie's had the burden on this motion to show "that there is an absence of evidence" that would support a reasonable inference of damage causation. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)," which Christie's did not do. *See Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 793 (D.C. Cir. 1983), *cert. denied*, 457 U.S. 1210 (1984).

painting as authentic and getting fair value for such painting, about which I had been told of "reservations" or "doubts" about the authenticity of my Schindler painting (Christie's version, *see* pp 9-11, *supra*), or I had been told that my painting was not authentic and a fake (my facts, *see* p. 11, *supra*), expressed to me by Christie's, relying on Frödl.[139]

At pp. 20-24, the Court focuses exclusively on: (1) the absence of physical damage to my painting at Christie's hands, which I did not allege and concede did not occur;[140] and (2) the damage to the marketability of my painting as an authentic work, and destruction of its value[141] did not occur,. for a

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[139] As previously discussed, *supra*, Christie's is one of the two (the other being Sotheby's) of the largest and most prestigious, respected and venerable art auction house purveyors of fine art, which had a reputation for high professionalism, experience and integrity, and Frödl is the Direktor of the Österreichische Galerie, the largest and most significant Austrian museum dedicated to 19th Century Austrian art, and had previously been the head of the art department of this museum, which had a relatively large collection of Schindler paintings.

[140] An obvious "straw man" argument set up by the Court to bolster its highly speculative and factually and legally insupportable damages analysis.

[141] *See* VC, ¶ 425, in which I stated: "Defendants' prestige and reputation in the art world as one of the world's two premier art auctioneers in the world and Defendants' conduct as described in paragraphs 1 through 420 of this Complaint has caused Fastov's Schindler painting to be virtually worthless and to be unmarketable as an authentic work by the Austrian artist Emil Jakob Schindler (1842-1892), and it can only be marketed on an ethical and practical basis as a decorative landscape that bears Schindler's signature. Fastov's Schindler painting has a fair market value of in excess of $150,000.00 if marketed and sold properly as an authentic work by the Austrian artist Emil Jakob Schindler (1842-1892). Marketed as a decorative landscape that bears Schindler's signature,

number of spurious and irrelevant reasons,[142] as follows:

Fastov's Schindler painting has a fair market value of between $1,500.00 and $3,000.00. Therefore, Fastov has been damaged by Defendants' such conduct in an amount to be determined at trial, but believed to in excess of $147,000.00 to $148,500.00."

[142] In the Order, (a) the Court accepted as true, the highly disputed material "facts" arising from Ludkin letter phony, fabricated rationale, and Frödl's March 11, 1994 assertions that he did not provide an opinion to Christie's and had not labeled my painting inauthentic and a fake; (b) Christie's had not "*publicly* impugned" (p. 22) or "secretly questioned the painting's authenticity" (p. 23) or "cast a 'serious cloud' over his painting by refusing to auction it" (p. 24) and stated that my "claims to damages defy all credulity" (a credibility assessment) (p. 24); (c) the Court rejected my assertion as "baseless" "that it would be unethical for him to sell the painting without revealing the existence of Frödl's and CMW's doubts about authenticity (which the Court rejects as having existed," (p. 23) per the Court's acceptance of the truth of such Ludkin letter rationale); (d) the Court stated: "Fastov, moreover, has produced no credible evidence...that CMW caused his painting to be unmarketable (Emphasis added.)" and then engaged in a further litany regarding facts that are irrelevant or disputed (p. 24); and (e) the Court stated that even if the value of my painting was damaged, it was not attributable to "what Christie's did or did not do," but "would have been a direct result of Fastov's own conduct, both 'within and without the courtroom' Biester Dec., Ex. 14, at 79." The Court betrayed that he was predicating his findings on his determinations of my credibility and my evidence vis-à-vis Christie's credibility (impermissible under summary judgment standards). In addition to finding impermissibly that I produced "no credible evidence," the Court stated: "Without any credible evidence of damages, Fastov has grasped at the flimsiest of straws in an attempt to support his otherwise unsupported, unmeritorious claims, claims that were—in the court's view—initiated in bad faith with the intent to subject Christie's to "the worst and most costly": litigation in Christie's experience. *Id.* [citing my Poltimore letter of July 2, 1994, Ex. 14, Biester Decl. Such

(i) *See* p. 9 et seq., *supra*, in which I vigorously attack and dispute the truth of the Ludkin letter rationale cited by the Court that Frödl was merely unable to provide an opinion, etc. at p. 11, Order, (ii) *See* pp. 9-11, *supra*, for my discussion of the withdrawal rationales furnished in testimony by Poltimore, Maclean and Goldsmith based on "reservations" and "doubts" about the painting's authenticity; (iii) *see* p. 10, *supra*, for my discussion of Frödl's opinion that my painting had atypical elements which caused him concern, as corroborated by S-H, (iv) There is a significant amount of credible evidence supporting my damage claims, as follows

Poltimore, in effect, testified that I would be damaged by the mere absence of a certificate/opinion of authenticity; [143] thus, even establishing that I was damaged by the Ludkin letter fabricated rationale, which was impermissibly accepted as true by the Court. Most importantly, however, Poltimore testified and provided evidence explicitly conceding that the marketability and value of my painting

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straws fall far short of creating a genuine issue of material fact with regard to damages and are clearly insufficient to withstand Christie's properly-supported motion for summary judgment as to all claims (Emphasis and bold face added.)." *See* fn. 10, *supra*, describing Attachment D, "Two Settlement Proposals," and Attachment E, a draft settlement agreement to my Poltimore letter, which destroy the Court's finding of my bad faith and abusive conduct and which Christie's counsel did not attach to Ex. 14, Biester Dec., my Poltimore letter, but which I did in Ex. 9, RSF Response, Att. B, as well as MY many statements that made clear that my primary goal in the Poltimore letter was to achieve a settlement. *See, e.g.*, the first sentence of my Poltimore letter at fn. 9 and pp. 36-37, *supra*.

[143] *See* RSF Dec., ¶ 37 for excerpts from Poltimore Dep. pp. 40-41, Ex. 4, RSF Memo; Ex. 4, RSF Surreply.

would be damaged, if prospective buyers of my painting heard of Frödl's "reservations or doubts about the authenticity of my painting" that would be bad for the picture and bad for our vendor," and that "would have affected negatively the salability or the price of sale of the picture," and that I could be exposed to liability and have my reputation besmirched as a seller of an inauthentic painting.[144] Goldsmith made a similar admission, as did Southern.[145] My damages concepts, including the obligation to disclose adverse information concerning the authenticity of a painting, were concurred with by the various Christie's officials with whom I spoke,[146] which obviously adversely affects significantly the marketability and value of the painting., particularly if it is regarded as being not

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[144] *See* RSF Dec., ¶ 38 for excerpts from Poltimore Dep. pp. 104-105, Ex. 4, RSF Memo; Ex. 4, RSF Surreply.

[145] Goldsmith testified that if Frodl expressed a negative view on the authenticity of the painting, it would have damaged the value of the painting, and it could not be sold by Christie's. *See* RSF Dec; ¶ 39 for excerpts from Goldsmith Dep. Vol. II, p. 97; Ex. 5, RSF Response, Att. A. Southern, another Christie's official, concurred with my assessment that I had been damaged by Christie's actions and could not sell the painting as an authentic work "for a price that was commensurate with its true value as an authentic painting" *See* VC, ¶¶ 386-387; *see also* Southern Dep. pp. 60, 61, 73-77, 80-83, 85-87, Ex. 5, RSF Surreply.

[146] *See* VC, ¶¶ 125-127, 131, 132, 149, 150 regarding Goldsmith; VC, ¶ 181 regarding S-H; VC, ¶¶ 238, 250-255 regarding Maclean; VC, ¶¶ 386-387, 411, regarding Southern; ¶¶ 289-291, 299-301 regarding Poltimore. *See also*, RSF Dec, ¶¶ 39, 40, 41, 38, respectively, for excerpts from Goldsmith Dep. II, pp. 28-29 (295-296), 97 (363); Maclean Dep. pp. 190-194; Southern, Dep. pp. 73-74, 80-82, 85, 86-87; Poltimore Dep. pp. 104- 105. *See also* excerpt from Poltimore Dep. p. 147 in RSF Dec., ¶ 42.

authentic and a fake. Moreover, both David Sellin and Thomas Dawson, who both qualify as art experts,[147] gave deposition testimony which impeaches the competence, expertise, honesty and integrity of Poltimore and Maclean and had very similar experiences to mine with these Christie's officials. Sellin confirmed that the value of my painting was damaged because of similar Christie's action against him and his painting, because he would be obligated to disclose facts similar to that which occurred in my case, which killed the marketability and value of our paintings.[148]

The Court failed to understand that my obligation to so disclose went beyond ethical obligations, and was based on some legal and very practical art market practices and potential liability and damages

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[147] Sellin is a highly educated former art museum curator with a Ph.D. in fine arts, and is a very experienced and sophisticated art scholar and collector, and Dawson is a long time, successful art dealer and gallery owner. *See* RSF Dec., ¶ 46 for excerpts from and an analysis of Sellin's Dep. testimony (Ex. 11, RSF Surreply) and RSF Dec., ¶ 47 for excerpts from and an analysis of Dawson's Dep. testimony (Ex. 7, RSF Surreply).

[148] Sellin provided testimony that Poltimore had fraudulently, erroneously and incompetently labeled his Fritz Thaulow painting a fake in 1988, merely on the basis of the opinion of an undisclosed journalist, and withdrew his painting from the Christie's specialized Scandinavian sale for which Christie's had fraudulently induced him to consign such painting. Sellin took the same position that I did regarding damages, which the Court chose to ignore, that Sellin believed he would be obligated to disclose the Christie's "secret" withdrawal of his painting and Christie's labeling his painting a fake to any prospective gallery or buyer: thus, his painting was unmarketable as an authentic Thaulow and he and his painting was damaged by Christie's as a result.. *See* RSF Dec., ¶ 46.

for me arising from: (1) that I, like Sellin, would be legally obligated under my implied duty or good faith and fair dealing to disclose and not deceitfully conceal these very damaging statements and actions of Christie's and Frödl, casting credible doubts on the authenticity of my painting, which would kill the sale of the painting to any prospective buyer or force me to sell it for a *de minimis* price; [149]and (2) as has been my wont in selling other art works, and as I would be required to do by any purchaser of a painting with a sales price of well in excess $100,000, I would have to guarantee the painting's authenticity, which could come back to damage me, if: (a) the purchaser' became concerned and contacted either Frödl or Christie's, or (b) attempted to sell the painting and, as Poltimore stated, a "general whispering campaign" about this Christie's/Frödl saga occurred, or Christie's or Frödl gave vent to their animus against me, p. 21, *supra*, in the "gossip-hungry" art market, the sale would be killed and the purchaser would seek damages from me. My damages were in excess of $147,000.00 to $148,500.00.[150] to which I am very competent to

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[149] No reasonable, prudent, knowledgeable purchaser would take the risk of paying well over $100,000 for a painting that he knew Christie's or Frödl might subsequently "kill" by adverse statements concerning its authenticity. Thus, as a practical matter, my painting was "dead," that is, unmarketable as an authentic painting by Schindler for a value commensurate with a similar authentic Schindler.

[150] With respect to proximate causation regarding damages to the value of the painting, *see* VC, ¶ 425; RSF Dec., ¶ 48; ¶¶ 22-24 of my declaration filed on July 7, 2000 in support of my memo in opposition to Christie's motion for summary judgment ("FasDec.") and ¶¶ 8-2 of my declaration filed in support of my surreply to Christie's such motion ("FasDec. 2") and with

testify. Finally, the Court did not discuss my other claims for compensatory damages.[151] Such damages, which the Court did not address, render the Court's findings on damages largely irrelevant.[152]

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regard to quantification of such damages, *see* FasDec., ¶¶ 23, 25; FasDec. 2, ¶¶ 22-24; my response in first and second paragraphs to Christie's Interrogatory 14, Ex. 3, Biester. Dec..

[151]The Court's conclusion that my "straws....are clearly insufficient to withstand Christie's properly-supported motion for summary judgment as to all claims (Emphasis and bold face added.)" almost laughable. In the aggregate, these compensatory damages greatly exceed the damages for to the value of the painting, including as of June 28, 1998, $32,871.37 in out of pocket expenses, other than medical expenses, $1,041.79 in out of pocket medical expenses, $1,281,450.00 in other economic damages, and damages attributable to Christie's causing me physical distress, including diabetes, and emotional distress, as well as punitive damages, for which, *inter alia*, I could be indirectly compensated for the attorney's fees I paid Mr. Russell and his law firms in excess of $200,000, or I could obtain via a motion for sanctions. With regard to the proximate causation and quantification of Fastov's other compensatory damages, *see* VC, ¶¶ 421-424, 426; FasDec., ¶¶ 26-33; FasDec. 2, ¶¶ 25-30; my response in the third through seventh paragraphs to Christie's Interrogatory 14, Ex. 3, Biester. Dec..

[152] I had been successfully investing in and selling works of art since the 1970's and was competent to make such an assessment. *See* ¶ 35 of to my declaration filed in support of my second Opposition to Christie's motion for summary judgment, and Exs. 39 and 42 thereto, filed on July 7, 2000, which are Christie's catalogue entries offering paintings by two other artists (Eurich and Martinez), which I consigned to Christie's in 1993, which yielded prices, which significantly exceeded Christie's high presale estimate, which I told the Christie's specialists were too low prior to the catalogues being published; set world records for each of these artists; and were the highest yielding lots in their respective Christie's sales.

VI. The Court's emotional distress analysis and findings were erroneous.

At p. 19, Order, the Court cited *Drejza v. Vaccaro*, 650 A.2d 1308, 1316 (D.C. 1994) for the proposition: "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." However, the Court failed to note that *Drejza* also stated at 650 A.2d at 1316 also stated: "Cases in which judges and juries must make nice judgments about the outrageousness (or lack thereof) of a defendant's conduct are intensely fact-bound;" and that the court found that plaintiff's circumstances and psychological make up made her susceptible to emotional distress; "an impartial trier of fact could reasonably" find that defendant's conduct with knowledge of her condition was "extreme and outrageous;"[153] and reversed summary

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[153] *See Langer v. George Washington University* 498 F. Supp.2d 196, 200 (D.C. 2007): "In some circumstances, however, the extreme and outrageous nature of conduct underlying an intentional infliction of emotional distress claim "'may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. *Drejza v. Vaccaro*, 650 A.2d 1308, 1313 (D.C. 1994) (quoting Restatement (Second) of Torts § 46 (1965)). Conduct "may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know." *Id.* (Emphasis added.)'" *Larijani v. Georgetown University*, 791 A.2d 41, 45 (D.C. 2002) held that if a defendant "knowingly and callously, did absolutely nothing about it" to correct his tortious conduct, which was a source of continuing distress for the plaintiff, the defendant can be liable for intentional infliction of emotional distress;" *Stevenson v. Bluhm*, Civil Action No. 06-0632 PLF, Loislaw p. 5 (D. D.C. 10-31-2006): "In conducting such an analysis, courts are guided by (1) applicable

judgment for defendant on infliction of emotional distress. The Court also ignored *Herbin v. Hoeffel*, 806 A.2d 186, 197 (D.C. 2002), a later infliction of emotional distress case, predicated on an attorney's breach of his fiduciary duty, which is at issue in this case. *Herbin* cited *Drejza* for the same proposition as the Court, but also held: "Where reasonable people could differ, however, that issue must be submitted to the jury[154].... We think this is such a case (Citations omitted)," and reversed summary judgment for defendant.[155] Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1328 (D.C. 1995) made clear that emotional distress damages arising from misrepresentation arising from a contract,

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contemporary community standards of offensiveness and decency, and (2) the specific context in which the conduct took place.' *King v. Kidd,* 640 A.2d 656, 668 (D.C. 1993) (citations omitted) (Emphasis added.)."

[154] *Adams v. Vertex, Inc.*, Civil Action 04-01026 (HHK) Loislaw p. 9 (D. D.C. 3-29-2007).

[155] *Brooks v. District Of Columbia*, Civil Action No. 05-362(GK), Loislaw pp. 6-7 (D. D.C. 11-20-2006) denied summary judgment for the defendant on an infliction of emotional distress claim on the basis that there were material disputed facts, observing: "The question on summary judgment is whether, based on the evidence produced, a reasonable jury could find that defendant's conduct was both sufficiently outrageous to satisfy this standard, and whether that conduct was done intentionally to hurt plaintiff, or at least with conscious disregard of his or her emotional well-being." *Liser v. Smith,* 254 F. Supp. 2d 89, 106 (D. D.C. 2003). When "reasonable minds could differ on whether the conduct was extreme and outrageous," the issue of intentional infliction of emotional distress is for the jury to decide and summary judgment should not be granted. *Butera v. Dist. of Columbia*, 83 F. Supp. 2d 15, 21 (D. D.C. 1999) (citing *Anderson v. Prease*, 445 A.2d 612, 613 (D.C. 1982), rev'd on other grounds, 235 F.3d 637 (D.C. Cir. 2001) (Emphasis added.)."

which is a key aspect of my claims, are available to a plaintiff.[156]

As discussed, *supra*, there is clear record evidence,[157] much of which is provided from Christie's officials own mouths (as well as my testimony and record documents) that Christie's engaged from 1993 through 1994 in extreme and outrageous conduct and, at a minimum, establishes

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[156] "We hold that, upon proof of intentional misrepresentation, a plaintiff may recover "emotional damages that are the natural and proximate result" of the defendant's conduct (recovery, including emotional damages, permitted for the "ordinary, natural and proximate consequences" of willful tortious action)... While the underlying dispute here is contractual in nature, defendants are alleged to have committed an intentional tort when they misrepresented the payoff amount of the note. Whether or not the tort was committed in a contractual context is not dispositive; mental suffering is a "natural and proximate" consequence of intentional fraud and should be a compensable injury...(since intentional fraudulent conduct is "bound to result in shame, humiliation and mental anguish for the plaintiff," injured party should be entitled to recover for emotional damages on claim for intentional misrepresentation). (Citations omitted; emphasis added.);" *Campbell v. State Farm Mutual Auto. Ins. Co.*, 65 P.3d 1134, 1165 (UT 2001); Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society,* 42 Vand. L. Rev. 1, 10-12, 23-32 (1989) ("[A]s a general rule, emotional distress damages should be awarded in fraud actions."). *See Adams v. George W. Cochran & Co., Inc.*, 597 A.2d 28, 36, fn. 6 (D.C. 1991) reversing a grant of summary judgment for defendant on a claim of damages for emotional distress arising from the discharge of a plaintiff who was an at-will employee and remanded the case, noting that an action for breach of an implied covenant of good faith and fair dealing might also lie in a case like this.

[157] At p. 19, Order, the Court erroneously concluded: "Fastov has submitted no evidence which would shock the conscience or exceed all possible bounds of decency."

that "a fair-minded jury could return a verdict for the [me] on the evidence presented."[158]. In essence, even though Christie's was my agent/fiduciary and was obligated to carry out their consignment agreement obligations of good faith and fair dealing, Christie's engaged in 1993-1994 in a continuing fraud and fraudulent concealment of their true reasons (discussed, *supra*) for withdrawing and refusing to offer my painting for sale by, in fact, telling me that my painting was not authentic and a fake, or, per Christie's fabricated version, Christie's and Frödl had "doubts" or "reservations" about the authenticity of my painting, thus, destroying the value of my most valuable art asset.[159] On April 1-2, 1993, Goldsmith and S-H sought to persuade me not to attempt to resurrect the authenticity of my "fake" painting. They knew I was upset, frustrated and angry about the Christie's withdrawal, and that I was going to unnecessarily have to expend significant time and energy in my resurrection efforts.[160] After I obtained and advised Maclean on November 5, 1993 of the Fuchs' Gutachten, Maclean mandated that I write a letter to Frödl get him to reverse his non-existent negative opinion on authenticity and give me a positive opinion, even though Maclean knew such negative opinion did not exist, and Fuchs was the Schindler expert. After I

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[158] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

[159] Christie's conduct did not consist of "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," for which liability cannot be imposed. *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998).

[160] *See* VC, ¶¶ 125, 135, 149, 150, 159, 164-166, 174, 181. 182, 188-190, 202, 204, 205, 210, 211, 213-215; Ex. 5, RSF Response, Att. B.

researched and wrote Frödl a letter and an analysis re the Schindler painting's authenticity (50 pages in the aggregate), and received Frödl's response, I spoke with Poltimore on March 23, 1994, and told him that Frödl `had denied providing Christie's with such negative opinion. Poltimore mendaciously insisted that Frödl was a liar; did not engage in meaningful telephone settlement discussions[161] and arrogantly and abusively mandated that I put my views in writing. Both Poltimore and Maclean have admitted that Frödl had doubts about the authenticity of my painting; and thus, they lied to me, even though "doubts about authenticity" can also have a devastating impact on the marketability and value of my painting. I researched and wrote a 79 page letter with over 260 pages of hand written attachments. Ludkin responded to my Poltimore letter with a 1 ½ page tissue of lies and the ultimate in fraudulent concealment and cover-up, stalling and stonewalling by fabricating the Frödl-based procedural rationale for Christie's withdrawal of my painting, discussed *supra*. When I spoke with Ludkin/Hall on August 18, 1994, she made additional misrepresentations, refused to talk substance over the phone and mandated that I put my views in writing.[162] Regarding these Christie's

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[161] While Poltimore was cavalierly and abusively prepared to be profligate with my time and energy, Poltimore "was not prepared to spend a great deal of time and energy talking or negotiating with Fastov on this matter" on the telephone(VC, ¶ 288).

[162] In response to this "put it in writing" mandate, I engaged in a 2 ½ year legal, auction house, art market and Christie's research and writing effort, which generated my 5 letters of and 4 extensive enclosures of May 13, 1997 (2,214 pages in the

officials mandates that I "put it in writing," I told them and Graham Southern, with whom I spoke on August 19, 1994, that the task would waste a lot of my time and effort,[163] and I had experienced and would continue to experience significant anxiety, frustration, cold sweats, even nightmares, a loss of sleep, anguish, even chest pains, and other health problems.[164] All of the foregoing was inspired by Christie's corporate culture, which initiated and sustained the Christie's and Sotheby's criminal conspiracy to fix consignor commission fees and other harmful actions against consignors, like me, *supra*, because the Christie's officials, who dealt with me, arrogantly believed they could get away with impunity in engaging in this arbitrary, capricious and abusive behavior. Christie's cavalierly shafted thousands of consignors around the world from 1992-1999 for which both Christie's and Sotheby's had to pay $276 million each to settle with the consignors. I was entitled to relief for emotional distress.

Conclusion:

For all the foregoing reasons, the Magistrate Judge should not compound the Court's errors by awarding Christie's any attorney's fees and costs.[165]

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aggregate) to the 3 Christie's chairmen and two other Christie's officials, which were arrogantly ignored. *See* pp. 6, 37, *supra*.

[163] *See* VC, ¶¶ 243, 253, 275, 310, 312, 314, 318, 322, 340, 364,365, 368, 371-373, 391, 414.

[164] *See* VC, ¶¶ 240, 253, 254, 275, 312, 314, 340, 364, 365,372, 373, 376, 379, 388, 394, 424.

[165] Given Christie's counsel's penchant for attacking my filings not on substance, but on length and writing style, I note for the record the following: The U.S. District Court's LCvR do not impose a page limitation on memorandum documents other than those supporting a motion, per LCvR, Rule 7. This is a

Respectfully submitted,

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supplementation memorandum designed to add to and enhance my testimony at the December 18, 2007 hearing and to spare the Magistrate Judge the time of having to listen to me testify to all of the assertions contained herein and such cross-examination, as the Magistrate Judge deems appropriate. I have attempted to be as concise as possible, given the complexity of the factual and legal issues raised by Christie's counsel's actions and the Court's Order. If the Magistrate Judge believes that it should rule on the length of this document, I respectfully request that the Magistrate Judge determine that such length is acceptable under the circumstances. I would also bring to the Magistrate Judge's attention the fact that at least one U.S. District Court Judge thought my lengthy documents and dense writing style to be sufficiently excellent to note same in his opinion. *See* footnote 3 of *City of Grand Rapids v. Richardson*, 429 F. Supp.. 1091 (W. D. Mich. 1977), for which the I wrote the Defendant's brief having no sleep in the previous 3 days during its preparation or before oral argument, which lasted for approximately 8 hours, before U.S. District Court Judge Nelson Miles, who had been sitting as a judge for many years and was well respected. He wrote in footnote 3 at 429 F. Supp. 1091:" n3 At the outset, this Court again wishes to commend counsel for both sides on the excellence of their respective briefs and oral arguments in terms of their substance, style and advocacy aspects. The Court finds it difficult to remember when it could make such a remark about the presentations of both parties (Emphasis added.)." I was the "party" who won this litigation and my opponent was regarded as one of Michigan's best litigators. My brief (memorandum) was approximately 75 pages long, with a very long supporting declaration, which I recall as being of approximately the same length with a great number of exhibits. Unlike Christie's counsel, I prevailed on the merits, not on an argument based on inducing improper judicial bias against my opponent and character assassination.

/s/ _____

Robert S. Fastov, *pro se*
4428-45th Street, N.W.
Washington, D.C. 20016-2053
Tel. No.: 202-537-1222
E-Mail: rfastov1@msn.com

Excerpt From Petitioner's Declaration Filed At The December 18, 2007 Hearing Before The Magistrate Judge

10. The relative financial condition of myself and Christie's and equity and justice, and the deterrent purposes of attorney's fees awards will be best served by the Magistrate Judge making a decision to not recommend to the Court that Christie's be awarded the fees and costs, that Salzman has claimed and the taxable costs, in the aggregate amount $637,174.97.

a. The courts have broad discretion to determine an amount of attorney's fees award and should consider a variety of mitigating, factual and equitable factors, including my financial condition, assets and resources and the extent to which deterrence will be served by the fees awarded, as well as the relative financial condition and inappropriate and unethical behavior of Christie's.[166]

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[166] *See Baker v. Alderman*, 158 F.3d 516, 528-529 (11th Cir. 1998); *Gibbs v. Clements Food Company*, 949 F.2d 344, 345 (10th Cir. 1991); *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2nd Cir. 1986). *Per Wolfe v. Perry*, 412 F.3d 707, 723, 724 (6th Cir. 2005): "All the courts of appeals which have addressed the issue have concluded that a nonprevailing plaintiff's ability to pay is not "a proper factor to consider in determining *whether* to award attorneys' fees against [the plaintiff]," but may be considered "when determining *the amount* of the attorneys' fees to be awarded against that party." *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234, 238 (5th Cir. 1990); *see also Gibbs v. Clements Food Co.*, 949 F.2d 344, 345 (10th Cir. 1991); *Miller v. L.A. County Bd. of Educ.*, 827 F.2d 617, 621 (9th Cir. 1987); *Munson v. Friske*, 754 F.2d 683, 697 (7th Cir. 1985); *Arnold v. Burger King Corp.*, 719 F.2d 63, 68 (4th Cir. 1983), *cert. denied*, 469 U.S. 826, 105 S.Ct. 108, 83 L.Ed.2d 51 (1984); *Charves v. W. Union Tel. Co.*, 711 F.2d 462, 465 (1st Cir. 1983); *Durrett v.*

"In appropriate circumstances, the district court should give weight to the relative financial positions of the litigants." *Arnold v. Burger King Corp.*, 719 F.2d 63, 68 (4th Cir. 1983) *cert. denied,* 469 U.S. 826 (1984); *Introcaso v. Cunningham*, 857 F.2d 965, 968-969 (4th Cir. 1988); *Donahue v. Staunton*, 471 F.2d 475, 483 (7th Cir. 1972). *See also*, e.g., *Pedlow v. Stamp*, 776 P.2d 382, 384, fn. 3 (Colo. 1989) listing 8

Jenkins Brickyard, Inc., 678 F.2d 911, 917 (11th Cir. 1982); *Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1028 (2d Cir. 1979). As the Fifth Circuit explained, "deterring suits without reasonable foundation, a purpose of the attorneys' fees provision, is not subserved by creating an exception for frivolous suits by the impecunious." *Alizadeh*, 910 F.2d at 238 (internal citation omitted). The Ninth Circuit cautioned however, that "[w]hile an award of attorney's fees for a frivolous lawsuit may be necessary to fulfill the deterrent purposes of 42 U.S.C. § 1988, . . . the award should not subject the plaintiff to financial ruin." *Miller*, 827 F.2d at 621. We agree with the reasoning of our sister circuits, and therefore hold that a nonprevailing plaintiff's ability to pay may be used as a factor to determine the size of the award, but not whether an award is appropriate in the first place. (Emphasis added.)."

[166] These 8 factors included, the following 5, which are directly relevant to the Magistrate Judge's assessment of Christie's and Christie's unethical and inappropriate behavior, including financial condition: "(a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted; "(b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action; "(c) The availability of facts to assist a party in determining the validity of a claim or defense; "(d) The relative financial positions of the parties involved; "(e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith."; *Hohokam Resources v. Maricopa County*, 169 Ariz. 596. 606 fn. 7, 821 P.2d 257 (Ariz. 1991).

mitigating and equitable factors to be included in a determination as to an award of attorney's fees. [167] *Debauche v. Trani*, 191 F.3d 499, 511 (4th Cir. 1999) held that it is reversible error for a court to have failed "to take into account the financial resources available to" the party against whom attorney's fees have been awarded in computing the amount of attorney's fees to be awarded.

b. As discussed, *infra*, Hughes and Salzman engaged in conduct on behalf of Christie's, that was unethical, which, *inter alia*, was specifically predicated on their failure to discharge their obligation to evaluate their client's case and the factual predicate for such case, before filing pleadings and taking other actions to mount a continuing defense based on perjurious testimony and fabricated documents and rejecting my offer to negotiate a settlement, when Christie's clearly was asking Hughes and Salzman to take such actions and had refused to engage in settlement negotiations with me. Thus, Christie' claims for attorney's fees

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[167] These 8 factors included, the following 5, which are directly relevant to the Magistrate Judge's assessment of Christie's and Christie's unethical and inappropriate behavior, including financial condition: "(a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted; "(b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action; "(c) The availability of facts to assist a party in determining the validity of a claim or defense; "(d) The relative financial positions of the parties involved; "(e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;"; *Hohokam Resources v. Maricopa County*, 169 Ariz. 596. 606 fn. 7, 821 P.2d 257 (Ariz. 1991).

and costs, based on Hughes and Salzman's services, should be denied. At the outset of this litigation (and thereafter) Hughes and Salzman made "no attempt independently to corroborate" and make "a reasonable inquiry" into the factual basis' of Christie's factual assertions, and they multiplied the proceedings in this case unreasonably and vexatiously. Thus, it is also clear that that Hughes and Salzman engaged in conduct on behalf of Christie's, which was sanctionable under the standards of F. R. Civ. P., Rule 11, 28 USC 1927 (*See Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 43-45 (D.C. Cir. 1990)) and the court's inherent powers (*See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-46 (1991)), inasmuch as Salzman and Hughes acted in bad faith, vexatiously, unreasonably, and the "very temple of justice has been defiled" by their actions. Accordingly, it is appropriate for the Magistrate Judge to consider Christie's relative financial condition and circumstances and the need for deterring this conduct and that of the prime beneficiary of such conduct, Christie's owner, Francois Pinault.[168]

My Financial Assets And Sources Of Income Would Be Significantly Reduced, If The Magistrate Judge Were To Award Christie's Such Fees And Costs. I Will Be 65 On May 12, 2008 And Have No Prospects Or Ability To Earn Income From The Private Practice Of Law, Because I Have No Relevant Legal

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[168] By way of analogy, the Magistrate Judge may want to evaluate Christie's conduct in light of the enhanced damages factors, including Christie's financial condition, as are set forth by the courts. *See, e.g., Century Wrecker Corp. v. E.R. Buske Mfg.*, 913 F. Supp. 1256, 1283-1290 (N.D.Iowa 1996).

Experience And My Health Problems Will Preclude Me From Doing So. My Health Problems Preclude Me From Earning Income From The Buying Or Selling Of Art In The Manner That I Did In The 1970's, 1980's And Early 1990's.

11. Before this hearing, I checked my bond and bond fund account statements and ascertained that I had approximately $1,719,000 in estimated current principal value in such accounts, but not taking into account, the fees and costs to me of selling such bonds and bond funds. Of this approximately $1,719,000, approximately $337,000 of this principal is held in trust to secure payments to my wife under a divorce settlement agreement of 2002. Thus, a net value of approximately $1,382,000 in unrestricted principal is available for me to satisfy Christie's claims for fees and costs. I also will have access to my SEP-IRA in the amount of approximately $100,000, when I reach age 65. However, I owe $200,000 that I recently borrowed to pay my wife her most recent installment this past year under the divorce settlement agreement. Thus, as a practical matter, I have access at this time to approximately $1,182,000 to pay Christie's the aggregate amount of $637,174.97 in fees and costs that Salzman has claimed, plus taxable costs. Thus, the unrestricted principal amount of my investments will be cut more than half to approximately $544,825.03, if the Magistrate Judge recommends and reports that I should pay Christie's all $637,174.97. This financial principal is my sole source of regular income. I have never earned one cent as a private fee from the practice of law, other than the salary I received from the US Government's Economic Development

Administration ("EDA") from July 1968-December 1985 and as an OEO Neighborhood Legal Services attorney from 1967-1968 in East Palo Alto, California. Other than this compensation, I never earned one cent from the practice of law and have not earned one cent since December 1985 therefrom, and, for the reasons set forth below, I do not believe I can earn an income from the private practice of law for a fee at this time or in the future.

12. As to my income, for this year it will be approximately $109,000, all generated by my bond investments. However, if my principal is reduced by the payment to Christie's of all or a substantial portion of the claimed fees and costs, my income will be cut considerably, and even if I were to invest my money in higher risk investments, it is doubtful that I would receive more than $65,000-$70,000 in income per annum, and I might lose some of my principal, if I invested it in higher yielding investments such as stocks, in which I have never invested and have no experience familiarity and expertise. In addition to supporting myself, I have been supporting my daughter since 2000, when she lost her last permanent, stable corporate job. This past year I have paid approximately $35,000 of my income to support my daughter, who has yet to find herself permanent employment and no prospects are on the horizon. Thus, I only had approximately $74,000 in net income available this year for my support. My former wife has refused and continues to refuse to provide my daughter with any cash financial support. If things continue as they are with my daughter, and my income were reduced from even the high income figure set forth above of approximately $65,000-$70,000, if the Magistrate

Judge and Court were to award Christie's all or substantially of the fees and costs descried above, I would have only $30,000-$35,000 in income per year to support myself.

13. I will be 65 years old on May 12, 2008. I did not earn social security, as I was a US government employee and I drew down my small government pension deposits, when I left the government in December 1985. No law firm would hire me as a retirement age attorney with no relevant private practice experience. My practice and experience as an OEO Neighborhood Legal Services attorney in 1967-1968 was confined largely to providing legal services to the poor to avoid evictions, wage garnishments, furniture repossessions, and assistance in debt matters, bankruptcy and child support. My practice and experience as a US government attorney was confined to government loan servicing and litigation, confined primarily to defending and asserting US Government claims, primarily involving administrative law. Other than these legal activities from 1967-December 1985, I have never practiced private law for compensation of any kind---never even drafted a will for a party --- and have not the slightest knowledge of private practice law, the pertinent ethics or administrative and business practices necessary to running a private law practice.

14. But what is determinative as to why I cannot earn any money of any consequence as an attorney now or in the future is that my health precludes me from being gainfully employed successfully as an attorney. I was diagnosed as a Type II diabetic in 1994 and remain diabetic with a history of heart problems and experienced a major heart attack in

late 1986, from which I was dead, but resurrected by electric shock paddles. I had quadruple by pass heart surgery in 2003 and have circulatory problems, which affect my ability to stand and walk. It is painful for me to stand and walk, and I have balance problems. I am no longer fit to engage in any kind of strenuous physical activity, although I attempt to exercise to prolong my longevity by walking, even though it is painful. I frequently get light headed, woozy, lose my train of thought and have difficulties concentrating and focusing and have problems at times with logical, precise thinking. It takes me an incredibly long time to produce any complex document, including a legal document, that I would have produced in a week or two, when I was in my prime. It took me nearly 4 weeks to produce this Declaration. I can no longer efficiently and effectively proofread documents. I edited and proofed this document 5 times, but I know, from past experience, that there are still errors, which I did not see or comprehend. I had similar experience in producing the RSF Supp and have already found some errors in that document. The thought has occurred to me that my problems of this nature could cause me to make a legal errors, which could hurt a client and subject me to malpractice claims, that could have the potential to bankrupt me.

15. Thus, if the Magistrate Judge were to recommend and report that I pay Christie's the full amount of Christie's claimed or a substantial amount thereof, my economic circumstances at this age would be severely reduced, and I would have an income that approaches the poverty level as my health costs and other cost problems with old age accelerate. When I was physically well in the 1970's

through 1985, I worked 18 hours a day and on weekends, practicing law and working very hard on my art purchases and sales. I made my profits on the art, most of which I converted into the bonds and bond funds I possess, that generate my sole source of regular income today. I did this by expending a lot of time and energy in searching for, acquiring, carrying, hauling, researching, restoring and conserving the art and the old picture frames (including regilding such frames), as well as making new picture frames and researching and preparing auction catalogue entries and transporting the art for sale to local auction houses. I used these same methods to make money on art from 1985 up till mid-1993. I can no longer physically do this, because of the health problems I have previously described. When I stopped working on my art and devoted all of my time to pursuing my claims against Christie's with regard to my Schindler painting, which was my most valuable art asset, but is virtually worthless now, my biceps were 20". Now they are, at best, 15" and I have lost all of the muscle tone I had as of that time and cannot carry or lift art of any size, and I cannot work on the art in the manner that I did, because of my other health problems. I can no longer make money investing and selling art in the manner that I did in the 1970's, 1980's and early 1990's. My parents are long deceased; I have received my inheritance from them; and I have no prospects of inheriting any money or assets from anyone else. Thus, my primary and only reliable source of income will probably be my bond investments.

16. In addition, I note that I paid my legal counsel Timothy Russell and his law firms in excess of $200,000.00 in compensation. I paid him $182,360.02

in cash and paid Mr. Russell with an antique American bronze of an Indian, worth between $20.000·$25,000, for his legal services from 1997 through 2000, when he and his law firm, Spector, Gadden & Rosen, filed a notice of withdrawal on September 22, 2000. I could afford to retain and pay Mr. Russell at that time, because I had significantly more investment assets and a much higher income generated therefrom. Given my current level of income, I cannot afford to retain and pay an attorney of any consequence for legal services in this matter. My principal and the income generated thereby, with which I was able to pay Mr. Russell and his firms, were greatly reduced by the divorce settlement agreement of 2002, which required me to pay my wife over $300,000 at the time of settlement, the over $100,000 I paid my divorce attorneys and the substantial costs I incurred in defending the divorce litigation.

17. In addition, I incurred in the aggregate from 1997, when I filed this lawsuit approximately $32,242.35 in related expenses. As of the date, I filed the Verified Complaint ("VC") in this matter, March 21, 1997, I had incurred approximately $16,022.04 in expenses in attempting to resolve and to pursue settlement with Christie's. My painting by Emil Jakob Schindler, which is the subject of this litigation, remains in my possession and I am unable and will remain unable to sell it for a commensurate value of approximately $150,000, which would be the fair market value, if it could be sold as an unqualifiedly authentic work by Schindler. It cannot be so sold, given Christie's actions and statements involving Frödl in this matter, which I am obligated to disclose under my implied contractual obligation

of good faith and fair dealing to a prospective purchaser and to avoid claims of fraud, misrepresentation and deceptive and unfair business practices under DC Code § 28-3901 et seq., which will kill any sale by which I could obtain such commensurate value. My position regarding the damages to the marketability and value of my painting was confirmed in deposition by certain Christie's officials and by David Sellin and is rooted in my legal and ethical obligations to a prospective purchaser.[169]

18. The Magistrate Judge should assess my credibility and demeanor and consider whether I am a sane person and whether a sane person would hire an attorney and give him approximately $200,0000 for his services and lay out close to $50,000 in expenses, if I had been pursuing this matter in bad faith for purpose of merely harassing Christie's or whether the Court was flat wrong in his assessments of my intent and motivation in pursuing my claims against Christie's. In addition, as I stated at p. 13 of RSF Memo Opp. Fees (as supported in ¶¶ 14, 27 of my Declaration filed with such Memo:

> No reasonable person would expend in the aggregate from April 1, 1993 through March 20, 1997 a 4,169.25 hours, as I did, in good faith and involving very burdensome efforts to attempt to cause Christie's to resolve and settle this matter with me to avoid wasting the time and resources of a U.S. District Court Judge and clogging a courtroom with a judicial resolution of this matter, if my purpose was to harass and act in bad faith, vexatiously or unreasonably toward

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[169] *See* RSF Supp. pp 41-45.

Christie's, unless I was certifiably insane, at any time in this process or now, which I am not.

19. As I have no present intention or capability at this time of ever initiating any litigation in the future against any one, there is no need for the Magistrate Judge to factor into its decision "deterring" me from "bad" legal actions in the future to justify an award of fees and costs to Christie's. *See* RSF Memo Opp. Fees, pp. 27-29 and ¶ 38 of my declaration filed in support thereof. Since I filed the RSF Memo. Opp. Fees on May 8, 2007, I achieved a very favorable settlement in *Fastov v. Palisades,* and I am involved in no other litigation other than this case at this time.

In Contrast To Me, Christie's Is A Multi-Billion Dollar Enterprise, Wholly Owned By Francois Pinault, Who Is # 34 On The *Forbes* List Of "World's Billionaires," With A Net Worth Of $14.5 Billion. Christie's Generates Many Billions Of Dollars In Income From Its Commissions On The Sale Of Art, Objets D'art And Other Property Each Year, Which Makes Clear That If Christie's Were Awarded The $637,174.97 In Fees And Costs From Me, Such Sum Would Be Less Than The Proverbial "Drop In The Bucket" For Christie's And Pinault.

20. In contrast to the devastating impact upon me and my circumstances of my being ordered to pay Christie's the claimed fees and costs and taxable cost of $637,174.97 is not even a mere drop in the bucket for Christie's, a multi-billion dollar a year business with billions in revenues, which is wholly owned by Francois Pinault, a French multi-billionaire, who is # 34 on the *Forbes* list of "World's Billionaires" with

a net worth of $14.5 billion.[170] To put this in further, very concrete perspective, I offer the following observations.

21. Per Christie's, New York's relevant commission schedule, that it uses to charge a consignor for each lot that Christie's sells on a consignor's behalf, if Christie's sells a lot for less than $2,000, the Christie's commission would be 20% of the hammer sales price; for each lot that Christie's sells for between $2,000 and $5,500, the Christie's commission would be 15% of the hammer sales price; and for each lot that Christie's sells for more than $5,500, the Christie's commission would be 10% on the amount of the hammer sales price that exceeded $5,500 with no limit on the amount that the consignor would pay this 10% commission. In addition, and very importantly, Christie's charges a buyer of each lot what Christie's calls a "buyer's premium", an auctioneer fee-gouging concept that first entered the auction trade in, if I recall correctly, the early 1980's and was initially 10% of the auction hammer sales price, that did not benefit the consignor, but was (and is) paid directly to the auctioneer, in addition to the fee the auctioneer charges the consignor of the lot in question. Per Christie's current, even higher buyer's premium fee-gouging schedule, the buyer's premium that Christie's now receives from a purchaser of a lot that sells for up to $20,000 is $25% of the auction hammer sales price; a lot that sells for more than $20,000 up $500,000, the Christie's sales premium is 20% of the sales price and or, if the hammer sales price is in excess of $500,001, Christie's receives a

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[170] *See* Ex. C hereto for the *Forbes* web page documents.

premium of 12% of such hammer sales price.[171] The consignor's fees and buyer's premium that Christie's London (CMW) charges are virtually identical to those of Christie's New York, except the values were expressed in £., not $ and reflects the fact that the £ is worth twice as much as the $.

22. Thus, if Christie's New York sells a lot for $499,900 (slightly less than maximum of $500,000, to which the 20% buyer's premium is applicable), Christie's would receive a 10% consignor fee commission of $49,900 and a 20% buyer's premium of $99,980 or $149,880 in the aggregate from the sale of one such lot. If Christie's sold 4 such lots, it would receive in the aggregate $599,520 or only approximately $38,000 less than the fees and costs Salzman and Christie's are seeking from me, plus the taxable costs in the aggregate amount of $637,174.97. If Christie's sold 5 such lots it would receive in the aggregate $749,400 or approximately $112,000 more than such aggregate fees and costs. I estimate that the Christie's organization sells tens of thousands of such lots each year. Looking at it from another perspective, Christie's would receive a !0% commission and 12 % buyer's premium (or 22% in the aggregate) `for any one lot that Christie's sold for $2,900,000, which would yield Christie's $638,000 in fees and premiums or approximately what Christie's is seeking from me in aggregate fees and costs of $637,174.97.

23. In November 2007, only one month of the year of Christie's operations, Christie's conducted 92 sales across the world at its various sales rooms at had

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[171] *See* Ex. D hereto for the Christie's commission and buyer's premium schedules.

aggregate sales in this one month of November 2007 of $3,611,276,956.[172] By way of approximation, using a composite commission rate of only 10% and a buyer's premium of only 20%, or 30% in fees and premiums generated for Christie's in the aggregate, Christie's earned $1,083,383,086.80 in fees and premiums from such $3,611,276,956 in aggregate November 2007 sales, or approximately 1,700 times the aggregate fees and costs of $637,174.97, that Christie's is seeking from me. By way of example, see certain particulars of the 2 the following Christie's November 2007 sales: (1) in Christie's Impressionist And Modern Art sale of November 6, 2007, 90 lots sold in the aggregate for $394,977,200.[173] Every one of the 90 lots, but one (lot 89, which sold for only $421,000) brought in excess of $499,900 and 32 of these 90 lots sold for more than $2,900,000, most for considerably more than this amount; and (2) in Christie's Post War and Contemporary Art sale of November 13, 2007, 67 lots sold in the aggregate for $325,006,000.[174] Every one of the 67 lots, but one (lot 62, which sold for only $337,000) brought in excess of $499,900 and 29 of these 67 lots which sold for more than $2,900,000, most for considerably more than this amount.

24. In short, Christie's does not need to, in effect, bankrupt me by obtaining the puny $637,174.97 Christie's claims from me to swell its already over brimming coffers and Mr. Pinault's net worth of $14.5 billion. It is this kind of corporate wealth and

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[172] *See* Ex. E hereto for the Christie's November 2007 sales.

[173] *See* Ex. F hereto for the Christie's sales list for the November 6, 2007 sale.

[174] *See* Ex. G hereto for the Christie's sales list for the November 13, 2007 sale.

the arrogance and greed it breeds, that caused the Christie's officials, who dealt with me in 1993-1994, to intentionally, abusively, arrogantly, fraudulently with impunity damage me and the value of my painting and inflict physical and emotional distress upon me.[175] It is this same corporate wealth, arrogance and greed which was the attitudinal predicate for the decisions of the 3 Christie's chairmen to whom I sent the extensive letters of May 13, 1997 and detailed, meticulously prepared analytic factual and legal assertions and arguments in the 4 document enclosures and the enclosed 36 record documents (discussed, *infra*), that was the underpinning for and bred the three Christie's Chairmen decision to reject my offer of settlement tendered therein; and in which requested them to accept or negotiate a settlement with me and to not ratify the actions of the Christie's officials who damaged me and to mount a litigation defense against my claims based on perjured testimony and fabricated documents.

The Nature And Impact Of The Christie's Decision To Enter Into, Maintain And Cover-Up Their 1992-1999 Criminal Conspiracy With Sotheby's To Fix Consignor Fees In Violation Of The Sherman Antitrust Act And To Take Other Actions Damaging To Their Consignors, Like Myself, And To Fix Buyer's Premium Fees Should Cause The Magistrate Judge To Deny Christie's Attorney's Fees And Costs.

25. Such decision by the Christie's Chairman to reject my offer and to opt to ratify and mount such a

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[175] *See* RSF Supp, pp. 18-22, discussing "D. Christie's dishonest and arrogant corporate culture, and Christie's true reasons for treating me in an arrogant, abusive and fraudulent manner."

defense was rooted in and consistent with Christie's same corporate wealth and arrogance and greed, which had led to a Christie's decision to enter into, maintain and cover-up their 1992-1999 criminal conspiracy with Sotheby's to fix consignor fees in violation of the Sherman Antitrust Act and to take other actions damaging to their consignors, like myself, and to fix buyer's premium fees. Conversations concerning mutual business interests, including agreements to enhance each auction house's profits at the expense of their consignors and buyers at auction through this criminal conspiracy commenced between the Chairman of Sotheby's, Alfred Taubman (1983-2000) and Chairman of Christie's International, PLC (a defendant in this litigation), Sir Anthony Tennant (1993-1996) in 1992. The details of this conspiracy were played out at Taubman's and Tennant's directions given to their respective subordinate executives. Taubman's subordinate was Sotheby's Chief Executive, Diana "Dede" Brooks (1994-1999) and Tennant's subordinate was Christie's Chief Executive, Christopher Davidge (1993-1999). Extensive conspiracy discussions were held during 1993 and 1994, the same time that Christie's was in the active process of shafting and damaging me, and the fixed consignor commission and buyer's premium rates were established early in 1995.

26. The price fixing of the consignor commission rates involved two components, the first, setting somewhat higher identical consignor commission rates, that each would charge, and, the second, adopting a policy that neither auction house would negotiate, bargain and agree to lower consignor commission rates, as they each had done in the past

for the purpose of enticing consignment business from each other. On March 9, 1995, Christie's announced the new consignor commission rates they had been discussing. Sotheby's adopted the same commission rates, with a few changes, on April 13, 1995. After news of the criminal conspiracy story broke in 2000, class actions were filed by Christie's and Sotheby's consignors in the US and abroad. Christie's had to settle with its consignors for an aggregate payment of $276,000,000 (½ of the $552,000,000 million payment for which Christie's and Sotheby's agreed to settle with all of these consignors in 2001-2002). Given the approximately $1,083,383,086.80 that Christie's earned from such its $3,611,276,956 in aggregate sales for one month of Christie's sales in November 2007, as detailed above, and Pinault's net worth of $14.5 billion, the Christie's settlement payment of $276,000,000, which was not all paid in cash, as some of it was paid with vouchers, was only "chump change" for Christie's, the greedy, partner with Sotheby's in it's a criminal conspiracy, and its multi-billionaire owner, Francois Pinault.

27. Ironically, at virtually the same the time that Christie's received my May 13, 1997 letters, Christie's received a U.S. government subpoena indicating that the U.S. was investigating Christie's and Sotheby' for, *inter alia*, price fixing in connection with consignor's commissions. The subpoenas sought, *inter alia*, "documents that related to discussions, proposed or actual, about a change in the consignor's commissions or buyer's premiums. For each fine art auction during the last five years, it also requested catalogues, consignors' lots, bidder registration forms, documents relating to financing

arrangements, invoices and papers that show the purchaser of each work and to whom it was delivered."

28. I was oblivious to all of these developments or the news stories concerning the possible conspiracy, when they first broke in June 1997 and culminated in early 2000, when the conspiracy was admitted publicly, and continued through 2001, as I was no longer involved in art acquisitions and auction sales and was concentrating my energies on the Christie's claims and litigation from 1997-2001. I did not become aware of this conspiracy and its implications until mid 2001, when this litigation went into hibernation under the auspices of Judge Friedman, who never ruled on the Christie's motion for summary judgment up through the time case was transferred to Judge Stafford in early 2005. Thus, I did not attempt, albeit unsuccessfully, to bring the conspiracy and its implications for this litigation until January 16, 2006 to Judge Stafford's attention, in response to the Judge Stafford's offer to receive additional summary judgment assertions and arguments of December 7, 2005. The Court's Order granting Christie's summary judgment, executed on February 22, 2006, approximately one month later than the January 16, 2006 submission did not mention the Christie's/Sotheby's conspiracy or otherwise reflect that the conspiracy and its implications had any impact or effect on the Court's erroneous castigation of ME AS THE BAD FAITH WRONGDOER IN THIS LITIGATION in the Order, when, in fact, Christie's had been THE BAD FAITH WRONGDOER AND CRIMINAL CONSPIRATOR from 1992-1999.

29. On June 2, 1997, in response to the subpoena, just after it received my May 13, 1997 letters and enclosures, (which were actually mailed close to May 21, 1997), Christie's denied the conspiracy and wrongdoing. The *New York Times* of June 3, 1997 stated, in part:

> Word of the investigation spread through New York City's art world late last week, and yesterday Christie's, the London auction house whose United States headquarters are on Park Avenue, reported, in a filing it made with the London stock exchange, that it had been subpoenaed...Since it is required to report any developments that could affect its stock price, it concluded the announcement by stating that its American subsidiary had recently received a subpoena from the Justice Department "seeking documents relating to the conduct of the U.S. art market."...(Emphasis added.)."

30. The *Times* went on to say that Christie's "understand that other U.S. auctioneers and several prominent New York art dealers have also been required to provide documents. Christie's is cooperating with the Justice Department's investigation. Christie's believes that it has acted properly at all times.'(Emphasis and bold face added.)."

31. The New York Times reported on June 17, 2001:

> After interviews in 1999 between the former Christie's president and in-house counsel, Patricia G. Hambrecht, Ms. Hambrecht gave Christie's outside counsel "information that prompted them

to interview him [Davidge]again," court papers say.

Mr. Davidge still denied any wrongdoing to the outside counsel, but Lord Charles Hindlip, chairman of Christie's since mid-1996,[176] suggested that Mr. Davidge was having conversations about commission charges with Sotheby's and that the two companies might have exchanged lists of their richest clients.

Mr. Davidge's assistant, Irmgrad Pickering, told Christie's lawyers that she believed that Mr. Davidge had met with Ms. Brooks during "the critical period" when both companies raised their commission fees in 1995, the court papers said.

The papers also say that in addition to Ms. Hambrecht, Christie's board members and top executives including Stephen Lash, its chairman in America, Christopher Burge, its honorary chairman in America and chief auctioneer and Francois Curiel, its chairman in France, all had knowledge that Mr. Davidge was communicating with Ms. Brooks (Emphasis added.)

32. I sent both The Lord Hindlip and Christopher Burge the above-referenced letters of May 13, 1997 in their capacities as Chairmen of 2 of the 3 Christie's defendants in this matter. In addition, I took Burge's deposition on April 6, 1999 and, in response to my question, he stated :"I believe Christie's has a reputation for honesty and integrity that has been built up over the years. I don't believe that – [is] part of the marketing message I believe is something already understood." Burge admitted that some Christie's consignors had stated to him that

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[176] Hindlip succeeded Tennant in 1996.

"Christie's reputation for integrity and honesty [was] part of their reason for [making a] consignment to Christie's." (Burge Dep. pp. 134-135) Burge also admitted that there were Christie's contracts and documents which embodied the concept that "Christie's acts as an agent fiduciary for its consignors," but claimed that he did not understand the question of whether there were Christie's documents that "as [a] fiduciary Christie's has the duty to act in the utmost good faith and in the interest of its principal throughout their relationship." (Burge Dep. pp. 169-171) I also sought to elicit from Burge information regarding other litigation initiated against Christie's by other consignors and claims filed consignors with Christie's concerning Christie's conduct which damaged other consignors, the existence of which Burge admitted. Salzman successfully insisted in deposition that Burge not answer questions concerning his knowledge of complaints filed with Christie's by disgruntled consignors, citing in an overreaching and unjustified fashion Magistrate Judge Robinson's order of December 7, 1998 denying my motion to compel discovery of this kind of information in certain respects (Burge Dep. pp. 178-180), even though the information I sought from Burge and in my motion to compel was highly relevant to my efforts to impeach the credibility of Christie's perjurious witnesses and could be a source of potential witnesses, and such information and witness testimony could buttress my claims for punitive damages.

33. In addition, on December 7, 1998, Magistrate Judge Robinson granted Salzman's request for an unduly restrictive protective order, the necessity of

which makes sense in the context of defending against the disclosure of information, which could embarrass Christie's and cause Christie's problems with cover-up and concealment from the ongoing U.S. Department Justice investigation of Christie's regarding the criminal conspiracy against its consignors, which was in full swing at that time. Burge never mentioned the conspiracy in his deposition. If I had been aware of the Christie's/Sotheby's criminal conspiracy and presented such information to Magistrate Judge Robinson and Judge Friedman, I am legally certain that my motion to compel discovery of this kind of information would have been granted, and that I could have obtained a great deal of very helpful information from Christie's.

34. Christie's continued its stonewall, stall and cover-up of the conspiracy, until early 2000, when it decided the jig was up and the best strategy was to beat Sotheby's to the U.S. Department of Justice's door to cut a deal to minimize or avoid criminal penalties, which it did. Sotheby's was fined and Taubman and Brooks were prosecuted and convicted. Brooks was fined $350,000, ordered to perform 1,000 hours of community service and had to forfeit to Sotheby's her stock options worth $11 million at the time. Taubman was sentenced to a year and a day in prison, fined $7.5 million and agreed to pay a substantial portion of the Sotheby's settlement portion of the class action lawsuits brought by Christie's and Sotheby's consignors. Sotheby's paid huge attorney's fees, pled guilty and was ordered to pay a criminal fine of $45 million on February 2, 2001, a process which Christie's escaped. Christie's and its chief conspirators,

Tennant and Davidge, got off Scot-free, because of the deal Christie's had cut with the U.S. Department of Justice, and the United Kingdom's laws did not permit extradition of Tennant and Davidge for these kinds of crimes. Christie's had initially denied culpability to the Department of Justice and the press from 1997 through 1999, and did not "rush" to the Department of Justice until January 2000 to cut a conditional amnesty deal, which ultimately resulted in such Scot-free treatment.

35. Davidge, the main Christie's implementer of the Tennant-generated criminal conspiracy was not indicted in the United Kingdom, but he agreed, in exchange for immunity, to testify against Taubman in the U.S. and did so. Davidge resigned on Christmas Eve 1999, just after he cut his deal with Christie's and had turned over his "criminal conspiracy" documents to Christie's for presentation to the Department of Justice. To get some appreciation of Christie's corporate wealth and the extent to which Christie's was prepared to reward a criminal conspirator, who had shafted Christie's consignors (I, too, was a Christie's consignor), Davidge received an $8 million severance package from Christie's, plus Christie's agreed to pay his legal fees and give him a consultancy worth about $600,000 a year (about the same amount of money that Christie's is seeking in legal fees and costs from me). That came on top of Davidge's pension of $1.6 million cash upfront and a $339,000 payment per year.[177]

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[177] *See* pp. 27-37 Letter of Robert S. Fastov to the Court in response to the Court's offer of December 7, 2005 to receive additional evidence and argument, which was filed on January 16, 2006 ("RSF Response") and my supporting declaration and

36. The fact that Christie's would lose a relatively small commission from the sale of my painting was not any deterrent to the abusive, fraudulent, arrogant and damaging conduct to which I was exposed by Christie's officials in 1993-1994. The fact that I was one of tens of thousands of Christie's consignors each year, and Christie's would earn a relatively small commission from a consignor like myself (in 1993, a 6 per cent consignor's commission, plus a 10% buyer's premium, which could yield Christie's approximately $14,400, if my painting reached Christie's high estimate of £60,000 ($90,000) or $24,000, if it brought the £100,000 ($150,000), which I thought it was worth), was no deterrent to Christie's actions damaging me. In short, the loss of fees that Christie's would earn from me was not a sufficient incentive for Christie's, which generates billions in commissions each year, to act fairly and reasonably toward me and was not a deterrent to Christie's acting toward in the above-described fashion for such reason. Christie's basic attitude is that a consignor, like me, was just a fungible source of a small amount of revenue, and I could be easily be replaced by some other consignor.

Exhibits 12 (pertinent *NY Times* articles) 13 (*The Art of the Steal (Inside the Sotheby's-Christie's Auction House Scandal)* by Christopher Mason) in Att. A thereto.

Excerpts From Petitioner's Appellate Brief

Excerpt 1

Christie's, not Fastov, attenuated this litigation. Fastov has a clear track record of attempting to mitigate his losses via settlement from the Poltimore letter of 1994, the May 13, 1997 letters, Fastov's Discovery And Settlement Memorandum transmitted to Christie's counsel, Salzman on April 23, 1998 (A1293-1329, A2169-2170) and his substantial efforts to achieve settlement with Salzman in March 2006 (*See* A3441-3443, A945-984, A993-1063, A993-1063), all of which were rejected with no meaningful settlement discussions with Christie's or Salzman. The Court did not consider and ignored Fastov's fact assertions, arguments and supporting documentary evidence, regarding the foregoing Fastov efforts, all of which were not rebutted by Christie's, which gives lie to the Court's above finding. The *coup de grace* to the Court's above "defiantly shunned" finding is that Christie's counsel Salzman rejected out of hand Fastov's significant efforts in March 2006 to settle this matter. *See* 7, *supra*

In addition, the foregoing makes clear that Fastov was not acting in bad faith or to harass and vex Christie's; did not abuse " the judicial process," and had not "wasted the time and energy of at least 3 federal judicial officers," and "degraded the entire judicial system," as the Court also found. The foregoing, plus the fact that Fastov initiated nothing, but filed responses in reaction to the Court's Orders, the Magistrate's Report and Christie's filings, also totally undercuts the Court's finding that Fastov

inflicted "senseless bleeding" and "persisted in inflicting more wounds" in the 4/25 Order. *See* A128-131....

Excerpt 2

3. The Court's invocation of and quotations from Judge Friedman's two Orders of 2000 criticizing Fastov's documents and the Court's criticism of Fastov's "45 pages of objections" to the Magistrate's Report in the 4/25 Order are not clear and convincing evidence of Fastov's bad faith or harassment or vexatious conduct or that Fastov intended to defile or abuse the judicial process requisite to invoke inherent authority to provide Christie's all its fees and expenses or any fees and expenses.

The undue length of a document does not meet the legal standards and evidentiary findings requisite to establish bad faith, harassment, vexatious conduct or defilement of the temple of justice to justify an award all of Christie's fees and expenses. *See* 13-14, *supra*; A1443-1444, A1531-1535, A2301-2304. The Corrected Order (A26-27) relied on Christie's statements in the Notice (A135, A137) to quote from two Orders of Judge Friedman of June 27, 2000 (A4-6) and August 29, 2000 (A7-9), that were critical of Fastov, which were totally irrelevant to the summary judgment issues and demonstrates how Christie's counsels induced judicial bias against Fastov by their Notice. The same Judge Friedman quotes appeared in the 3/14 Order (A48-49) and 4/25 Order (A127). The first quotation in the 4/25 Order is from the June 27 Order determining that Fastov's

opposition to Christie's summary judgment motion should not be filed, because Fastov's opposition, that was prepared and filed by his counsel, Russell (not Fastov), was too long and threatened future sanctions. *See* A2186-2194 for Fastov's justification for filing such lengthy opposition. Even though Russell's opposition exceeded page length rules, the length of Fastov's statement of disputed and undisputed facts, declaration and exhibits violated no rules and were so lengthy, because, in essence: (1) Christie's made many erroneous assertions in their opposition, declarations and statement concerning facts, which were not, according to Christie's, undisputed and when, in fact, they were, and Christie's also made many misrepresentations of fact and distortions. Thus, Fastov needed to provide detailed supporting analysis and documentation thereof; (2) Christie's omitted many material facts, which Fastov knew Christie's would dispute, and it was necessary to explain and document why such facts were material, and why Christie's would dispute such facts. (4) Fastov included in his statement concerning facts many lengthy supporting quotations from record documents, as a convenience to Judge Friedman. Had Judge Friedman merely read the Table of Contents for Fastov's Statement Of Disputed And Undisputed Material Facts (A1673-1687), he should have concluded that Christie's was not entitled to summary judgment; and Christie's counsels had wasted his time in filing its summary judgment motion and acted unethically. Christie's violated the fundamental Black Letter law (Rule 56, F. R. Civ. P.) principle governing summary judgment--that summary judgment is not available, if there are material disputed facts and other

summary judgment principles. *See* RSF Supp., A1715-1736, A2094-2098.

Judge Friedman had not warned or sanctioned Fastov or his counsel, Russell prior to the June 27, 2000 Order, in which Judge Friedman limited sanctions and fines to Fastov's actions "from the date of this Order forward" and did not sanction either of them thereafter. However, Judge Friedman criticized Russell: "Plaintiff's filing seriously brings into question the judgment and discretion of his [Plaintiff's] legal counsel...his counsel may have violated Rule 1.2 of the Rules of Professional Conduct" (A4).

During the time Russell represented Fastov, Russell had the final authority to determine whether a strategy would be adopted or a whether a document would be prepared and filed with the Court. Except for Fastov's VC and declarations, Russell signed virtually all of the documents filed with the Court until August 18, 2000. Fastov's declaration, statement regarding facts, and exhibits supporting his opposition violated no rule of the LCvR, including Rules 7 and 5.1 or the F. R. Civ. P., Rule 10 (a). Judge Friedman had the right to strike Russell's memorandum in opposition, because it violated LCvR Rule 7's 45 page limit by 14 pages, but did not strike Christie's memorandum, even though Christie's exceeded the 45 page limit by 8 pages. Russell filed a new opposition memorandum and supporting documents on July 7, 2000, that were materially adversely affected by Judge Friedman's extreme page restrictions in the June 27, 2000 Order. Such Order limited Fastov's declaration, statement of material facts and exhibits to only 200 pages, even though Christie's supporting

memorandum exceeded the 45 page limit by 8 pages and Christie's filed 334 pages of declarations, statement of material facts and exhibits.

The second quotation in the Corrected (A 27), 3/14 (A48-49) and 4/25 (A127) Orders is from Judge Friedman's August 29, 2000 Order striking Fastov's motion for leave to file a surreply, even though Fastov's motion complied with the 45 page limitation of Rule 7, LCvR and did not violate the LCvR or the F. R. Civ. P.. *See* A2194-2202, RSF Factual Assertions justifying his filing such motion and supporting memorandum. Fastov prepared and signed this document on August 18, 2000, but Mr. Russell remained Fastov's counsel of record, until Fastov, who was upset with Russell's performance, permitted Russell to withdraw from the case, per Judge Friedman's Order of September 15, 2000 (Dkt. # 99). Russell read and concurred with Fastov's such motion and memorandum, before it was filed. Judge Friedman changed his mind and later granted on November 16, 2000 (A10) Fastov's subsequent motion for leave to file a surreply, and Fastov filed such Surreply on January 19, 2001 (Dkt. # 107). This was the first motion for leave to file a surreply that Fastov had ever filed in his life, and he was much influenced by his desire to overcome the problems caused for him by Judge Friedman's severely limiting the nature and length of his substitute opposition and wanted to make a detailed record for Judge Friedman and appeal, as best he could.[178]

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[178] Regarding Fastov's 225 page verified complaint, the Court merely stated at A126-127 that Fastov's filed such VC, but did not criticize it. Fastov justified his filing the lengthy VC, in part, because he had intended to file in relatively short order a motion for summary judgment utilizing the VC as his

It appears that Judge Friedman, at most, skimmed Fastov's opposition and motion documents; thus, he did not expend significant time on these documents. The Court never saw or read these documents, as they were both stricken, and Christie's did not reply to Fastov's opposition and filed a short response to such motion. (Dkt. #93).

The length criticism of Fastov's 45 page objection to the Magistrate's Report (A2277-2443), in the second portion of the 4/25 Order(A129), does not cite a legal basis for such criticism and was unwarranted, as the LCvR 7 permits filing a 45 page memorandum, with which Fastov complied. The footnotes in and exhibits to RSF Obj. Mag. Report (A2277-2442) violate no Rule of the F. R. Civ. P. Rule or LCvR. There were "hundreds of pages" of exhibits; however, all 5 of such exhibits were relevant and appropriate. 3 of the 5 exhibits, A-C (RSF Supp., RSF Factual Assertions; RSF Memo. Opp. Fees) were copies of lengthy documents, previously filed with the Magistrate, provided for the Court's convenience. These and the other 2 documents were referred to and cited in such RSF Obj. Mag. Report and were very relevant. The only support for the observation (A129) that "Fastov thus continues to engage in the very conduct that, in part, has resulted in sanctions being awarded against him" are the quotations (A127-128) from the two Judge Friedman Orders. The Court's criticisms, plus his objection to Fastov's "prolixity in verbiage" (A129) is

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supporting affidavit. He could not do so, because Christie's perjurious defense put material facts in dispute, which did not preclude Christie's unethical counsels from doing so. *See* A2181-2185.

unwarranted. Fastov's lengthy, dense, meticulous writing style was the style he used when actively practicing law from 1968-1985. No court criticized him for it; rather, he received judicial praise. *See* fn. 79,[179] A2198 for the praise at footnote 3, 429 F. Supp. 1091, that a very respected and experienced U.S. District Court Judge, Nelson Miles, gave to Fastov's even lengthier brief in another case with many attachments, which was written in the same

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[179] Text of fn. 79: "Given Christie's counsel's penchant for attacking my filings not on substance, but on length and writing style, I note for the record the following: The U.S. District Court's LCvR do not impose a page limitation on memorandum documents other than those supporting a motion, per LCvR, Rule 7 and 10 (a). I would also bring to the Magistrate Judge's attention the fact that at least one U.S. District Court Judge thought my lengthy documents and dense writing style to be sufficiently excellent to note same in his opinion. *See* footnote 3 of *City of Grand Rapids v. Richardson*, 429 F. Supp. 1091 (W. D. Mich. 1977), for which the I wrote the Defendant's brief having no sleep in the previous 3 days during its preparation or before oral argument, which lasted for approximately 8 hours, before U.S. District Court Judge Nelson Miles, who had been sitting as a judge for many years and was well respected. He wrote in footnote 3 at 429 F. Supp. 1091: "n3 At the outset, this Court again wishes to commend counsel for both sides on the excellence of their respective briefs and oral arguments in terms of their substance, style and advocacy aspects. The Court finds it difficult to remember when it could make such a remark about the presentations of both parties (Emphasis added.)." I was the "party" who won this litigation and my opponent was regarded as one of Michigan's best litigators. My brief (memorandum) was approximately 75 pages long, with a very long supporting declaration, which I recall as being of approximately the same length with a great number of exhibits. Unlike Christie's counsel, I prevailed on the merits, not on an argument based on inducing improper judicial bias against my opponent and character assassination."

style as Fastov manifested in RSF Obj. Mag. Report and in his stricken motion for leave to file a surreply before Judge Friedman. It is, thus, inconceivable that this Court could fairly hold that Fastov's "length" problems could justify findings that would warrant invocation of inherent authority to find bad faith, sanctioning Fastov and awarding Christie's all its fees and expenses.

The 4/25 Order reflects that the Court did not address Fastov's arguments contained in any of Fastov's 9 relevant filings in such Order, including the criticized RSF Obj. Mag. Report. Christie's only filed a 4 page response thereto and a total of 10 other pages regarding the Magistrate's Report issues, before the Court in the 4/25 Order. Thus, neither the Court nor Christie's spent any significant time regarding Fastov's such filings. All were filed in response to Christie's seeking $630,043.32 in fees and expenses or judicial actions. Thus, Fastov never initiated any action or document, for which the Court found that Fastov initiated and filed in bad faith and sought to harass or vex Christie's or to abuse or defile the judicial process or waste judicial resources. Similarly, the documents that Judge Friedman criticized that were filed by Russell and Fastov were filed in response to a Christie's motion and cost *de minimis* amounts of his and Christie's time.

Excerpt 3

B. Christie's Notice

The first document filed belatedly by Christie's with Judge Stafford, a notice of supplemental

authority allegedly, but not, in fact, regarding summary judgment, with a covering letter to the Court of February 14, 2006, and, as a sole exhibit, the Opinion of Judge Alexander Williams, (A 139-156) in *Robert S. Fastov v. Palisades Swimming Pool Association, Inc.* Civil Action No. AW-05-CV-1780 (D. Md) of January 31, 2006. Such Notice and Opinion raised issues of whether Palisades had or had not falsely accused Fastov of sexual perversion (child molestation, pederasty, pedophilia and other inappropriate sexual conduct) and battery and assault. Also, Judge Williams erroneously granted Palisades' motion for attorneys fees for his prelitigation letters to Palisades seeking settlement, but threatening litigation, if Palisades did not settle and withdraw such unfounded defamatory and inflammatory statements. Judge Williams dismissed Fastov's case for lack of jurisdiction. Such Opinion was also Exhibit 5 to Christie's motion for attorney's fees (A249-266).

When the Court ruled on Christie's summary judgment motion, shortly after Christie's filed such Notice and Opinion, he knew he had a choice between accepting the assertions and arguments of Christie's counsel, a prestigious Wall Street law firm with many counsels assigned to this case and Fastov, a single *pro se* litigant, who might well be a sex pervert, guilty of assaultive behavior and had just been sanctioned with attorney's fees by another court (erroneously) for prelitigation letters threatening litigation. Christie's neglected to tell the Court at any time that Judge Williams subsequently dismissed Palisades motion for attorney's fees on June 26, 2006. (A3542). Fastov and Palisades subsequently settled the matter, wherein Palisades,

in effect, withdrew such statements and admitted that it had not intended and did not assert that Fastov was a person who practiced sexual perversion and assaultive behavior, and waived its claim to approximately $40,000 in attorney's fees from Fastov, in effect, acknowledging that its claims for attorney's fees based on such prelitigation letters lacked merit.[180] Fastov was not able to bring these matters to the Court's attention until after the Court's 3/14 Order in the RSF Obj. Mag. Report of February 12, 2008 (A 2289-2291, A2307-2308), but the Court ignored them or their possible implications concerning the Court's possible bias against Fastov and his speculative inferences as to Fastov's motives, intent, credibility and integrity manifested in the Corrective and 3/14 Orders.

C. The Impact Of Christie's Notice And The Court's Orders

Such Notice and Opinion were untimely and totally irrelevant to the summary judgment issues, raising, in addition to Fastov's status as a possible sex pervert and assaulter, a bias-inducing issues based on Fastov's Poltimore letter and Fastov's documents criticized in Judge Friedman's 2000 Orders and drawing ERRONEOUS AND SPECULATIVE ADVERSE INFERENCES regarding them, as to Fastov's motives, intent and integrity, NOT EVIDENCE. Christie's incorrectly speculated that Fastov "intended to prosecute his lawsuits in such a way that his adversaries would be put to enormous expense, even if his claims lacked

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[180] *See* A1716-1719, A1767-1769, A2289-2291, A3499-3505, A3575-3579, A2112, A2178, A2307-2308, A2318, A2492-2493, A2498-2499, A2505, A1362-1363.

merit" ("Notice Speculation;" A134, 136), echoed by the Court in the Corrected, 3/14 and 4/25 Orders (A38, A49, A127-128,130). Christie's February 14, 2006 filing was almost 1 month late, given Judge Stafford's advising the parties on December 7, 2005, that he would receive supplemental filings regarding summary judgment on or before January 16, 2006 (A12). Fastov complied with this deadline and only addressed summary judgment issues. Christie's did not. Fastov objected and requested Judge Stafford (A851-865) to not consider such late, totally irrelevant filings and made clear that Christie's goals in such filing were to prejudice and bias the Court against Fastov on summary judgment and to make Christie's case for sanctions, prior to summary judgment. (*See* A134-156) Notwithstanding Fastov's objections, Christie's achieved both goals.

Without a hearing, that had been requested by both parties (A133a, A504), the Court entered a Judgment on February 22, 2006 (A13) and Corrected Order granting Christie's summary judgment on March 1, 2006 (A14-39). The Corrected Order quoted at A24-27 from the Poltimore letter and two Judge Friedman Orders, which were cited in the Notice and were totally irrelevant to the summary judgment issues.[181] These quotes were repeated verbatim with

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[181] Such Corrected Order manifested an egregious abuse of discretion and many erroneous conclusions of law predicated on erroneous findings of material facts, virtually all of which were highly disputed. The Court also improperly drew inferences from Christie's "facts," not Fastov's and accepted Christie's credibility and rejected Fastov's credibility; and inferred and made determinations regarding Fastov's credibility, motive and intent, all of which violated Black Letter Law principles of summary judgment. *See, e.g.,* RSF Supp. A1711, A1715-1736, A2094-2098.

some additional quotations in the Court's 3/14 Order (A46-49) granting Christie's motion for attorney's fees and the 4/25 Order (A125-127), awarding Christie's $630,043.32 in fees and expenses. They were the factual findings supporting the Court's erroneous, inferred, speculative finding of Fastov's bad faith and intent to vex and harass Christie's the Corrected Order (A38) and to grant Christie's fees motion in the 3/14 Order (A49-50) and, with some supplementation, the award $630,043.32 in the 4/25 Order (A127-131), which makes clear that the Court was spurred on by the Christie's Notice and Notice Speculation to draw adverse, erroneous, speculative and dispositive inferences concerning Fastov's bad motives, intent, credibility and integrity in these Orders.

Fastov 's notice of appeal of March 30, 2006 from such Corrected Order of March 1, 2006 was untimely, per this Court, even though it was filed within 30 days of the filing of the Corrected Order. This Court also gave Fastov no oral argument and short shrift, per a per curiam order, which affirmed, Fastov's believes improperly (*See* A1376-1405, A3817-3843), the Court's denial on June 8, 2006 (A42-45) of Fastov's motion for an extension of time to file a notice of appeal of April 23, 2006. Consistent with the Court's penchant for drawing unjustifiably inferences as to Fastov's credibility and integrity and without ever holding a hearing, in which he could assess Fastov's credibility, integrity and honesty, in such denial, he made dispositive findings, that he found (A44) Fastov to be "disingenuous" regarding his lack of knowledge regarding "Notices of Appeal

and the nuances of appellate practice" and ignorance of the existence and implications of "Rule 58, F. R. Civ. P. requirement of a single document judgment." The Court also was "not convinced by the plaintiff's assertion that he failed to receive notice of the judgment until April 11, 2006" (A44). Fastov's questioned assertions were made in a declaration under penalty of perjury, which, *inter alia*, made clear that he had, in essence, not practiced law since December 1985 and prior thereto had no experience in taking an appeal from an adverse decision, had virtually no appellate experience and explained the circumstances in which he had learned of the existence of the judgment on April 11, 2006. In filing his notice of appeal within 30 days of the Corrected Order, Fastov had relied on the literal language of Rule 4 (a) (1) (A), F. R. App. P. and 28 U.S.C. 2107 (a), which permitted filing a notice within 30 days of a judgment OR ORDER. *See* ¶ 5, RSF Factual Assertions (A2114-2116; also A2221-2223).

Even though Fastov believed that the Corrected Order would have readily been reversed by this Court, he attempted in March 2006 for personal reasons to end this litigation by offering a settlement, which Christie's counsels rejected out of hand. Fastov offered not to file a notice of appeal and to pay Christie's taxable costs, if Christie's did not pursue attorney's fees. Fastov prepared a lengthy settlement letter/memorandum for Christie's counsels asserting that Christie's would not prevail on appeal and would not be awarded attorney's fees, which Christie's counsels ignored. *See* A3441-3443, A945-984, A993-1063, A3393-3439.

Christie's filed a fees motion on April 6, 2006 (A157-266) that relied on 28 U.S.C. § 1927 and the courts' inherent power (A170, A176) which was clearly untimely, to the extent that Christie's relied on a court's inherent power, in that the Judgment was entered on February 22, 2006, per the 14 day post judgment filing deadline of F. R. Civ. P. Rule 54 (d) (2) (B), discussed, *infra*, 14-15. Prior to issuing this 3/14 Order, the Court entered an Order of May 23, 2006 (A40-41) denying Fastov's motion for a hearing on Christie's fees motion and for leave to file a surreply with a proposed surreply appended of May 9, 2006 (A1331-1365). Thus, the only presentation the Court considered was RSF Opp. Fees motion (A867-916) and its attachments (A917-1329), and the arguments Fastov raised were not addressed by the Court in the 3/14 Order. The Court ignored such Rule 54 argument, even though the Court denied Fastov a right to an appeal on summary judgment, when, at the worst, Fastov's filed a Notification of Appeal within 30 days of the Corrected Order and only missed the 30 day period from the date of judgment by less than a week, while Christie's fees motion was filed on April 6, 2006, more than a month late and Christie's Notice was filed on February 14, 2006, almost a month late.

The Court referred the matter to Magistrate Judge Alan Kay regarding the amount of the fees award. After briefing and a December 18, 2007 hearing, the Magistrate, pursuant to the courts' inherent authority and rejecting the usage of 28 U.S.C. § 1927 (A116-117), recommended a reduction of Christie's request for $630,043.32 in fees and expenses to $110,000.00 in his Report and Recommendation of January 24, 2008 (A123).

The Magistrate stated at the hearing that, although a formal order had not been entered, Judge Stafford had decided to step down from this case in favor of Judge Friedman (A59-A60). Fastov sent a letter to Judge Friedman of December 31, 2007 (A2243-2276) urging Judge Friedman to reassume jurisdiction over the case and, in support thereof, made critical comments pertaining to Judge Stafford's conduct and decisions in the case. On January 4, 2008, the Magistrate advised the parties, without explanation, that Judge Stafford had reversed his decision to withdraw from the case (A112a). The Court may have wanted to preserve his 3/14 Order and opportunity to award Christie's significant fees, which suggests strongly the Court's predisposition and bias against Fastov.

After briefing, but not holding a hearing, as requested by Fastov (A3550-3601a), the Court entered a Judgment and the 4/25 Order. Without addressing any argument made by Fastov in 9 filed documents, the Court: (1) denied Fastov's request for a hearing; (2) relied exclusively on the courts' inherent authority (barred by Rule 54, (d) (2) (B)) and awarded Christie's $630,043.24 in fees and expenses; duplicating $7,131.65 in taxable costs;[182] (3) adopted and incorporated the Magistrate's Report, with the exception of the $110,000 award recommendation; (4) and ordered that "No motion or petition for rehearing would be entertained"(A131).

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[182] *See* Christie's costs regarding court reporters' fees of $6,705.65 and for copying of $631.92, as approved in the Clerk's Bill of Costs of August 31, 2007 (A51-53), and Christie's requested court reporters' fees of $10,055.65 and copying fees of $1,076.31 (427u). Christie's admits that the taxable costs are duplicative (A443-444).

Fastov filed a timely notice of appeal on May 21, 2008 (A3643-3644).

Summary of Argument

The Court made an award of fees and expenses predicated on an untimely Christie's fees motion, based on the courts' inherent authority; abused his discretion; made "findings" that did not come close to passing the clear and convincing evidence test; denied Fastov due process by not holding a hearing on the record; abused his discretion by failing to address any of Fastov's arguments; ignored Supreme Court law and other relevant law; made erroneous legal conclusions; manifested a clear and continuing bias against Fastov; made "fact" findings that were unsupported, speculative inferences (which are contradicted by Fastov's unrebutted evidence) as to Fastov's motives, intent, credibility, honesty, integrity and competence; and ignored equitable factors, including the relative wealth of Fastov and Christie's, and the Magistrate Judge's recommendation of a $110,000.00 fee and expense award in deciding to grant Christie's all of their attorney fees and expenses of $630,043.32, which duplicated $7,131.65 in taxable costs, a total Fastov debt of $637,174.97. These kinds of basic, egregious flaws call into question the competence, fairness and integrity of the judiciary; fly in the face of clear U.S. Supreme Court and other precedent, and are unjust and should be reversed.

Excerpt 4

E. Application of *Chambers* and its progeny and related cases to the second portion of the 4/25 Order (A128-131) require reversal.

At A128-130, 4/25 Order, there were other new erroneous key findings of "fact." In addition to the findings regarding Fastov's unduly lengthy "45 page" objections to the Magistrate's Report and that Fastov's claims were frivolous, etc, and Fastov was mean and greedy, *supra*, 21-22, the Court also made the erroneous finding of marginal relevance that Fastov "defiantly shunned every opportunity to mitigate his loss" and other findings based on this concept. The Court also erroneously found that Fastov did not "corroborate" (with documents) his financial status. These findings are controverted by Fastov's factual assertions and credible, unrebutted record documents, which the Court ignored.

1. The Court's erroneous failure "to mitigate his loss" finding

This finding (A129) was predicated on Christie's phony, disingenuous, "noblesse oblige" offer contained in Christie's Conditional Objection to the Magistrate Judge's Report (A435), that Christie's would accept the Magistrate's recommendation of $110,000 award, "only if Plaintiff accepts the [Magistrate's] Report and Recommendation and does not seek to have it reduced." Such offer was phony, because it was filed on February 11, 2008, 1 day before Fastov's objection to such Report was due, which Christie's knew Fastov would not receive, as a *pro se* litigant, via snail mail, until after he had filed any objection he had to such Report, which Fastov did on February 12, 2008 (A2277-2443). In essence, Fastov sought to have such $110,000 recommendation reduced to $0.00. Christie's never contacted Fastov prior thereto in writing or by phone

regarding such offer. The Court erroneously concluded at A129), that Fastov had:

> defiantly shunned every opportunity to miti·gate his loss. The magistrate judge's compassion, and the defendants offer to accept a reduced amount have been met by Fastov's continued strident rejection of reason (Emphasis and bold face added)

Thus, the Court fell for this Christie's counsels' ploy to elicit precisely the reaction the Court had to such phony offer. Fastov had legitimate reasons to object to the Magistrate's Report, per RSF Obj. Mag. Report (A2278-2326), which made clear that the Magistrate had erred and the 3/14 Order, on which the Magistrate predicated his Report, was grossly erroneous and a clear abuse of discretion.

Christie's, not Fastov, attenuated this litigation. Fastov has a clear track record of attempting to mitigate his losses via settlement from the Poltimore letter of 1994, the May 13, 1997 letters, Fastov's Discovery And Settlement Memorandum transmitted to Christie's counsel, Salzman on April 23, 1998 (A1293-1329, A2169-2170) and his substantial efforts to achieve settlement with Salzman in March 2006 (*See* A3441-3443, A945-984, A993-1063, A993-1063), all of which were rejected with no meaningful settlement discussions with Christie's or Salzman. The Court did not consider and ignored Fastov's fact assertions, arguments and supporting documentary evidence, regarding the foregoing Fastov efforts, all of which were not rebutted by Christie's, which gives lie to the Court's above finding. The *coup de grace* to the Court's above "defiantly shunned" finding is that Christie's counsel

Salzman rejected out of hand Fastov's significant efforts in March 2006 to settle this matter. *See* 7, *supra*

In addition, the foregoing makes clear that Fastov was not acting in bad faith or to harass and vex Christie's; did not abuse " the judicial process," and had not "wasted the time and energy of at least 3 federal judicial officers," and "degraded the entire judicial system," as the Court also found. The foregoing, plus the fact that Fastov initiated nothing, but filed responses in reaction to the Court's Orders, the Magistrate's Report and Christie's filings, also totally undercuts the Court's finding that Fastov inflicted "senseless bleeding" and "persisted in inflicting more wounds" in the 4/2 5 Order. *See* A128-131.

2. The Court's erroneous "failure to corrobo-rate" finding, and the Court's failure to consider the relative wealth of Fastov and Christie's

The 4/25 Order criticized Fastov for not filing documents corroborating his financial status; thus, justifying the Court's awarding Christie's $630,043.32, by rejecting (A128, A131) the Magistrate's recommendation (A121-123) that Christie's $630,043.32 claim be reduced to $110,000, because of Fastov's financial condition. Even though Fastov initially made such statements regarding his financial condition in his Declaration Under Penalty of Perjury RSF Factual Assertions(A2121-2128), Exhibit 1, filed at the December 18, 2007 Magistrate's hearing (A96), the Magistrate found Fastov sufficiently credible to reduce Christie's claims to $110,000 based on Fastov's assertions (A68-73). regarding the adverse impact upon him of a

$630,043.32 award to Christie's. Contrary to the Court's finding, Fastov submitted corroborating evidentiary documents, including those pertaining to all Fastov's relevant bank, brokerage, lender's accounts and two credit card company documents regarding his assets, liabilities, income and poor credit rating (A3446-3466, A3539-3540).

See ¶ 10 of the original RSF Factual Assertions Declaration (A2119-2120) entitled:

> 10. The relative financial condition of myself and Christie's and equity and justice, and the deterrent purposes of attorney's fees awards will be best served by the Magistrate Judge making a decision to not recommend to the Court that Christie's be awarded the fees and costs, that Salzman has claimed and the taxable costs, in the aggregate amount of $637,174.97.

See also Fastov's Declaration assertions in ¶¶ 11-20 thereof (A2121-2128) and Fastov's evidentiary documents supporting such assertion (A3446-3466, A3539-3540), all of which is evidence, and which Christie's did not rebut, and the Court ignored. Fastov demonstrated that his financial assets would be reduced by approximately 1/3[183] and that, as a result, his income "approaches the poverty level" (¶15, A2121), if Christie's were awarded all its fees and expenses. In light of the corroborating evidentiary documents, Fastov revised ¶ 12 of RSF Factual Assertions and stated, in part, in such

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[183] As a result of the 2008 financial crisis and Fastov's very recent investment losses, Fastov's assets were reduced in value by approximately $200,000. Thus, awarding Christie's $637,174.97 in fees, expenses and costs will reduce Fastov's assets by approximately 2/5 of their value.

revised ¶ 12 that his net income would be "at the poverty level." (A 2525, A2534-2535).

Christie's income and wealth are huge, as is that of its sole owner, Francois Pinault. *See* A2128-2131, A2227-2242. In essence, Christie's earns billions of dollars each year. *See, e.g.,* November 2007, during which Christie's conducted 92 sales and had aggregate sales in this one month of $3,611,276,956, which means that Christie's earned approximately $1,083,383,086.80 in consignor fees and buyer's premiums from such November 2007 sales, or approximately 1,700 times the aggregate fees, expenses and taxable costs of $637,174.97, that Christie's has obtained from Fastov. The prime beneficiary of Christie's fee award is Francois Pinault, who was # 34 on the 2007 *Forbes* list of "World's Billionaires," with a net worth of $14.5 billion in 2007, and, per such 2008 *Forbes* list, Pinault's net worth climbed to $16.9 billion. However, Fastov's financial position significantly worsened in 2007. American Express and Discover Cards reduced his lines of credit to $500 and Fastov's cash advance limits to $200 and $300, respectively (A3539-3540).

In their extremely brief and largely irrelevant filings (A434-448), Christie's offered some irrelevant speculations regarding Fastov's financial status, but presented no evidence, documented or undocumented, to rebut and contest Fastov's assertions regarding his financial status and the impact of his having to pay Christie's fees and expenses in their "entirety" or Fastov's assertions regarding the great income and wealth of Christie's and Francois Pinault. Christie's did not even provide speculations regarding such income and wealth.

¶ No. 1, 4/25 Order (A131), adopting and incorporating the Magistrate's Report in such Order, "except as to the amount to be awarded to the defendants," clearly affects this Court's review of the Court's 4/25 Order. Such adoption benefits Fastov to the extent that Magistrate made some findings, such as 28 U.S.C. § 1927, relied on by the Court in the 3/14 Order, to a limited extent, along with the courts' inherent power, to grant Christie's fees motion, was inapplicable (A116-117). Thus, the Court relied on its inherent power to sanction (A128), which strengthens Fastov's arguments, *supra*, 14-15 predicated on Rule 54 (d) (2) (B) and (E), F. R. Civ. P. Such ¶ No. 1 also means that the Court is adopting some of the Magistrate's erroneous determinations and abuses of discretion. Thus, the Court and the Magistrate, abused their discretion by failing to consider the relative income and great wealth of Christie's and Francois Pinault and other relevant equitable factors to determine the amount of Christie's fees and expenses, if any.

3. The Court's failure to consider other equitable factors, plus the deterrence factor and that Fastov did not need to be deterred

There were four other major equitable factors, which neither the Magistrate nor the Court addressed in determining the award amount, which should have caused them to eliminate any award and was an abuse of discretion.

First, *See* A2126-2127, in which Fastov asserted he had already paid Russell, his counsel from 1997-2000, in excess of $200,000 in legal fees and incurred in the aggregate $48,264.39 in out of pocket expenses in this litigation. Fastov has not earned

any income from the practice of law since December, 1985 (A2124).

Second, Regarding Christie's highly inflammatory and prejudicial use of Judge Williams Opinion in *Fastov v. Palisades*, Fastov was never sanctioned by any court for his conduct while practicing law for compensation, and Judge Williams subsequently dismissed Palisades motion for attorney's fees (A3542). Palisades waived any claims for it's approximately $40,000.00 in attorney's fees and admitted that it had not intended to and did not libel Fastov as a sex pervert and assaulter, as part of the settlement with Fastov. Christie's never told the Court about these developments (A2111-2112).

Third, *See* Appendix citations, *supra*, fn. 37 regarding the nature and impact of the Christie's entering, maintaining and covering-up their 1993-1999 criminal conspiracy with Sotheby's to fix consignor fees in violation of the Sherman Act and to take other damaging actions and their implications for this litigation. This conspiracy, unbeknownst to Fastov or Judge Friedman, paralleled the exact time period in which Fastov was attempting to sell his painting through Christie's, to achieve a settlement and the early stages of this litigation. Ignorance of the conspiracy may have significantly affected Judge Friedman's rulings adverse to Fastov, *inter alia*, re discovery (Dkt. # 70,) concerning, *inter alia*, the crime-fraud exception (Dkt. # 54) and Christie's refusal to discuss settlement in any meaningful fashion with Fastov, a Christie's consignor, which, in turn, allowed Christie's counsels to put on track and maintain their "legal fees gravy train" on track.

Fourth, Christie's counsels engaged in other unethical or inappropriate conduct as they did not

review documents available to them, Fastov's Poltimore letter and Attachments or the May 13, 1997 letters and Enclosures; and thus, were unable to discharge and did not discharge their ethical obligation to their clients with regard to assessing and making recommendations to their clients about the alternative of settlement vs. mounting a costly litigation defense that could only generate significant legal fees for Christie's counsels and costs and, at best, would result in Christie's merely obtaining a Pyrrhic victory, a judgment paper that stated, in effect: "Christie's wins." Also, Christie's counsels acted unethically in filing a motion for summary judgment when they knew to a legal certainty, material facts were disputed and made misleading and disingenuous arguments in support thereof. Christie's counsels' conduct described in this paragraph also permitted them unethically (*See* A3626-3642) to put on track and maintain their "legal fees gravy train," which should preclude Christie's from recovering any of their $637,174.97 fees, expenses and taxable costs from the outset of this litigation to the present. *See* A2117-2120, A2138-2173, A2496-2498, A3497-3498, A3510, A3602-3632 for Fastov's assertions regarding these matters, which were totally ignored by the Magistrate and Court.

Most significantly, the Magistrate and the Court failed to take into account that there was no need to "deter" Fastov from future misconduct, which is a primary purpose of sanctions,[184] and that the Court was obligated to apply and use the "least severe sanction" necessary to deter Fastov from future

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[184] See *In Re Kujawa*, fn. 19.

inappropriate conduct." *See* RSF Memo. Opp. Fees in which Fastov discussed: "6. Providing Christie's with any attorney's fees under the Court's inherent power or 28 U.S.C. § 1927 will not further the major purposes justifying these powers, which is to deter me from intentionally engaging in conducting litigation unreasonably, vexatiously or in bad faith (Emphasis added.)." (A1444-A1446; also A878-879, A2284-2285, A3499-3500). In essence, Fastov cited his health problems and age (now 65 1/2), and that Fastov had not practiced law for income since 1985 and had no ability, skills, physical or metal capacity or inclination to engage in any other future litigation. *See* RSF Factual Assertions (A2125-2128). At A2128, Fastov stated: "As I have no present intention or capability at this time of ever initiating any litigation in the future against any one, there is no need for the Magistrate Judge to factor into its decision "deterring" me from "bad" legal actions in the future to justify an award of fees and costs to Christie's."

4. The Court's failure to consider duplicative taxable costs and Fastov's arguments concern-

ing the Corrected Order

The 4/25 Order rejected the Magistrate's $110,000 (not $630,043.32) recommendation, made after the Magistrate granted Fastov, as *pro se*, his first and only *pro se* hearing in this litigation,[185] Without a hearing, the Court shifted the "entirety" of Christie's fees and costs to Fastov and approved a $630,043.32

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[185] As a *pro se* litigant, Fastov should be judged by the liberal standards, yet he has been significantly prejudiced by the judicial procedures affecting his *pro se* status (A1447-1449).

at A131, 4/25 Order. Such award ignored the $7,131.65 in duplicated taxable costs previously awarded Christie's (A51-53); thus, Fastov has to pay Christie's $637,174.97. "The district court must disallow claims for "excessive, redundant, or otherwise unnecessary" charges, *Hensley v. Eckerhart,* 461 U.S. 424, 434, (1983); *Action on Smoking and Health v. Civil Aeronautics Bd.,* 724 F.2d 211, 221 (D.C. Cir. 1984).

The Court's predicate for such taxable costs and the award of fees and expenses was the Court's egregiously erroneous Corrected Order (A14-39). RSF Supp. attacks every aspect of the Corrected Order, including its findings regarding summary judgment (A1715-1736; also A2094-2098), damages (A1755-1759); the DC Consumer Protection Procedures Act (A1751-1755, A2-3), infliction of emotional distress (A1760-1763), and that the statute of limitations barred Fastov's claims (A1736-1751; also A1580-1668, A2099-2108a). Most importantly, Fastov made clear that the Court ignored and trampled on basic Black Law letter principles of summary judgment and ignored material disputed facts; relied on Christie's facts, not Fastov's; and inferred Fastov's motives, intent and credibility which are clearly barred by unequivocal precedent. (*See* Rule 56 (c), F. R. Civ. P, A1715-1736, A2094-2098). Virtually every material fact was disputed and Fastov has documentary support for his facts; and Christie's has virtually none; and the Christie's witnesses impeached each other on key material facts and supported Fastov's damages assertions regarding the Schindler painting, which the Court ignored.

5. The Court's unsupported and controverted vitriolic tirade, its causes and implications

The overriding and dominant characteristic of the second portion of the 4/25 Order (A128-131), which demonstrates the Court's unrestrained bias against Fastov is a hyperbolic, vitriolic "purple prose" tirade against Fastov's motives, intent, meanness, maliciousness, greediness, credibility, honesty, integrity, lack of common sense and competence. This tirade is largely based on the Court's erroneous inferences and speculations, NOT EVIDENCE, at A125-127. They were made without benefit of observing Fastov in any hearing; are unsupported by evidence, and are rebutted by Fastov's uncontradicted, credible evidence, which is not impeached by Christie's disingenuous, scanty, unsupported speculations.[186] Such purple prose and tirade seizes upon and buttresses with no credible evidence, the Court's characterizations in his 3/14 Order findings that Fastov acted in bad faith and vexatiously harassed Christie's; abused the judicial process; and manifested the Court's bias against Fastov. Such tirade and the total fee shifting to Fastov of Christie's fees and expenses, may well have its immediate roots in Judge Stafford's reasons for reneging on his commitment to turn the case back to Judge Friedman, c. January 4, 2008, discussed, *supra*, which started with Christie's Notice and Notice Speculation.

The limitations imposed by *Chambers* and other cases on the inherent power to sanction and "fee-shift," show that in the 4/25 Order the Court acted in a clearly erroneous manner and abused his

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[186] *See, e.g.*, Argument III, RSF Opp. Cond. Obj (A2488-2520).

discretion in his bad faith, vexatious conduct, harassment and abuse of the judiciary findings and his such shifting of the "entirety" of the fees and expenses to Fastov. They cannot be the basis for providing the winning party on summary judgment with huge tort-like punitive damages that are awarded on the basis of a court's perception of the merits of a case, *See* fn. 25, *supra*; *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1503 (5th Cir. 1995): "Tort-like punitive damages are awarded on the basis of the merits of a case, while bad-faith fee-shifting punishes abuses of the litigation process." Christie's proffered no evidence that there was a cause and effect relationship between the Poltimore letter, the Fastov documents criticized by Judge Friedman and Fastov's objections to the Magistrate's Report, criticized by the Court, which they were obligated to produce. *See, e.g., Batson v. Neal Spelce Associates, Inc.*, 765 F.2d 511, Fn. 3 (5th Cir. 1985). The Court, in effect, provided Christie's with a large punitive damages award, while superficially festooning his tirade in this Order with some of the terms used in *Chambers*. In effect, relying on his inaccurate, inferential speculations (NOT EVIDENCE) regarding Fastov's intent and motivations based on the Poltimore letter, Judge Friedman's Orders and RSF Obj. Mag. Report, the Court turned Fastov's 15 year painful odyssey, 1993-2008, pursuing Christie's ethically, fairly and with meticulous, dogged diligence into a rationale for sanctioning Fastov with a huge award when Fastov only responded to Christie's filings and the Court's Orders and was not initiating actions to inflict costs on Christie's, for punishing Fastov by shifting to

Fastov "the entirety" of Christie's fees and expenses, plus duplicative taxable costs.

III. Summary And Conclusion

The Court's key finding at the end of the 4/25 Order was:

> Now Fastov must pay for the vexatiously pursuing frivolous claims, for prosecuting his case in bad faith, for multiplying the proceedings unnecessarily, and, for generally engaging in conduct that degrades the entire judicial system." Also "with myopic vengeance, Fastov has pursued the defendants, using and abusing them and the judicial process." Thus, Fastov is not entitled to "minimize his exposure to paying for harm the he alone has caused. Under these unusual circumstances...[Christie's] is entitled to be made whole. (Emphasis added.). (A130-131)

The Court has already sanctioned Fastov by abusing his discretion in failing to address Fastov's arguments in his many filings. Had the Court acted properly when ruling on Christie's motion for attorney's fees, he would have denied Christie's fees motion, and this matter would have come to an end in 2006. Instead, because of this abuse, Fastov had to prepare 11 documents from May 8, 2007 to April 10, 2008 and to take this appeal, which has required Fastov to spend unnecessarily thousands of hours and litigation costs in defending against Christie's utterly meritless fees motion that was untimely and barred by F. R. Civ. P. Rule 54, (d) (2) (B) and (E), as Christie's and the Court in the 3/14 and 4/25 Orders were predicated on the courts' inherent authority to sanction. Such inherent authority is the only basis upon which the Court could have granted

Christie's all of its fees and expenses, as 28 U.S.C. § 1927 only permits a court to award fees and costs, that were excess and caused by the specific improper conduct. *See* 15, *supra*.

Fastov transmitted the Christie's-mandated, legally protected and inaccurately interpreted and characterized Poltimore letter, which was the "bad faith" linch pin of the Court's Orders. Russell and Fastov filed 3 criticized documents in the litigation over a 11 year period, that Judge Friedman or the Court found to be too long, but for which Fastov had a reasonable justification. Judge Friedman never sanctioned Fastov. The mandated Poltimore letter, as well as the mandated May 13, 1997 letters manifest Fastov's overriding purpose of achieving settlement. The 3 documents criticized for being too long by Judge Friedman and the Court were all filed in response to a Christie's motion for summary judgment or the Magistrate's Report. Fastov was responding to such motion and Report and did not *sua sponte* initiate these filings to run up Christie's fees and costs. Nonetheless, with the Christie's-mandated Poltimore letter as a linch pin, such documents were erroneously interpreted and found by the Court to be part of a Fastov bad faith strategy to conduct this lawsuit for purposes of vexing and harassing Christie's by running up Christie's litigation fees and costs and seeking to abuse the judicial process. This warranted Fastov's being ordered, without any hearing and consideration of any of his arguments, to pay all of Christie's fees and expenses, $630,043.32, even though the Magistrate, after hearing Fastov, reduced Christie's award to $110,000. Fastov was twice deprived of due process by the Court's denial of a hearing mandated by

Roadway regarding a significant property interest and was not permitted to file a key surreply regarding Christie's fees motion.

The 4/25 Order's findings regarding Fastov's "failure to corroborate" his assertions regarding his financial status and his "repeated failure to mitigate his losses" was contradicted by Fastov's unrebutted evidence, which the Court ignored. There is no evidentiary support for the Court's "findings" and vitriolic tirade at A129-131, which are only supported by the Court's festooning its purple prose with *Chambers* "word labels" and erroneous reliance on the egregiously flawed Corrected Order and incorrect speculative inferences regarding Fastov's motives, intent, credibility, honesty, integrity, competence, meanness and greed, which are contradicted by Fastov's unrebutted evidence, which were ignored. The Court's hostility toward Fastov in such tirade and in other Court Orders make clear that the Court was biased against Fastov, almost certainly by Christie's highly inflammatory and prejudicial Notice. of February 14, 2006. Such bias was also manifested in the Court's reversing on c. January 4, 2008 his decision to relinquish jurisdiction of this case in response to Fastov's letter of December 31, 2007 to Judge Friedman urging him to resume jurisdiction, which was critical of the Court.

The Court abused his discretion and erred in his findings under applicable legal principles. The Court abused his discretion by not addressing Fastov's substantive arguments attacking the 3/14 Order. The Court did not "calibrate" the amount of the award, which must be no greater than necessary to achieve the purpose that animates its exercise,

deterrence of Fastov. The Court also failed to take into account the relative wealth of Fastov and Christie's and other equitable factors, including Fastov's fee expenditures and litigation costs; the impact of the Christie's/Sotheby's 1993-1999 criminal conspiracy and cover-up thereof on this litigation; and the improper and unethical conduct of Christie's counsels that allowed them to put on track and maintain their "legal fee gravy train," including their failure to assess properly and apprise their clients of the merits of the settlement alternative vs. litigation and their inappropriate, unethical summary judgment motion, buttressed by their irrelevant, untimely, highly prejudicial and bias-inducing filing of the Notice and Opinion. The Magistrate, after holding the December 8, 2007 hearing that Fastov requested and in which Fastov was able to present oral argument by himself for the first time in this litigation, reduced Christie's fees and expenses to $110,000 solely on the basis of Fastov's weak financial condition, but did not consider other relevant factors. There was no fraud upon the Court, nothing extraordinary, or "defiling the temple of justice," warranting the Court's award of all of Christie's fees and costs, $630,043.32 (plus duplicative the $7,131.65 in taxable costs), such as were present in *Chambers*. Even if this Court rejects Fastov's legal and factual arguments regarding Fastov's 1994 Poltimore letter and Fastov's two documents criticized for being too long in Judge Friedman's 2000 Orders, one of which was prepared by Russell, and Fastov's objections to the Magistrate's Report, criticized by the Court, they do not come close to the conduct present in *Chambers* and generated virtually no expenditure of time by

Christie's counsels. Such documents are slim reeds and cannot support any award of fees and expenses pursuant to inherent authority, under the legal standards set forth, *supra*.

The Court's April 25, 2008 Judgment and Order should be reversed and vacated, and Fastov should be awarded costs of appeal.

Petitioner's Petition For Rehearing Regarding The D.C. Circuit's Affirmance Of Judge Stafford's Order Denying Petitioner's Motion For An Extension Of Time To File A Notice Of Appeal of June 8, 2006

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 06-7116
Dist. Ct. No. 97cv00578 (PLF)

ROBERT S. FASTOV, Plaintiff–Appellant,

v.

CHRISTIE'S INTERNATIONAL P.L.C., CHRISTIE, MANSON & WOODS LTD., and CHRISTIE'S INC., Defendants-Appellees.

PLAINTIFF/APPELLANT ROBERT S. FASTOV'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC REGARDING THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ENTERED ON APRIL 10, 2007, AFFIRMING THE ORDER OF THE DISTRICT COURT DENYING PLAINTIFF/APPELLANT'S MOTION FOR AN EXTENSION OF TIME TO FILE A NOTICE OF APPEAL PURSUANT TO F. R. APP. P., 4 (a) (5) AND 4 (a) (6) AND 28 U.S.C. §2107 (c)

Submitted by:

Robert S. Fastov
Plaintiff/Appellant
Pro Se
4428-45th Street, N.W.
Washington, D.C. 20016-2053
Tel. No. 202-537-1222

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GLOSSARY

"bill of costs" refers to the Bill of Costs filed by Christie's on March 13, 2006

"Chr. Br." refers to the Brief of Defendants-Appellees filed in this Court on or about January 10, 2007

"Christie's" refers collectively to Defendants-Appellees Christie's International P.L.C., Christie, Manson & Woods Ltd., and Christie's Inc.

"Christie's motion for summary judgment" refers to Christies' Motion for Summary Judgment filed by Christie's on May 1, 2000

"Christie's motion for attorney's fees" refers to Motion for Attorney Fees filed by Christie's on April 6, 2006

"Christie's opposition to my motion" refers to Christie's Memorandum In Opposition To Plaintiff's Motion For An Extension Of Time To File A Notice Of Appeal filed on May 5, 2006, including the proposed Order denying my motion

"corrected order" refers to Corrected Order granting Christie's summary judgment executed by Judge William Stafford, U.S; District Court Judge on February 27, 2006 and entered on March 21, 2006

"court" refers to the United States District Court For The District Of Columbia and/or Judge William Stafford

"dec." refers to my Declaration Under Penalty of Perjury annexed hereto filed in support of my Petition For Rehearing and my Petition For Rehearing En Banc

"dec. supporting my memorandum in opposition to Christie's motion to dismiss appeal" refers to Declaration Under Penalty Of Perjury Of Robert S. Fastov Filed In Support Of His Memorandum In Opposition To Appellees' Motion To Dismiss Appeal filed in this Court on April 28, 2006

"dec. supporting my memorandum regarding Christie's motion for attorney's fees" refers to the Declaration Under Penalty Of Perjury Of Robert S. Fastov Filed In Support Of Plaintiff's Memorandum In Opposition To Christie's Motion For Attorney's Fees filed on April 18, 2006

"dec. supporting my motion for leave to file plaintiff's surreply to defendants' reply memorandum regarding its motion for attorney's fees" refers to the Declaration Under Penalty Of Perjury Of Robert S. Fastov Filed In Support Of Plaintiff's Motion For Leave To File A Surreply To Christie's Reply Memorandum In Support of Christie's Motion For Attorney's Fees filed on May 9, 2006

"dec. filed supporting my motion" refers to the Declaration Under Penalty Of Perjury Of Robert S. Fastov Filed In Support Of His Motion For An Extension Of Time To File A Notice Of Appeal And Memorandum In Support Thereof filed on April 23, 2006

"dec. filed supporting my petition for rehearing with respect to the order of this Court filed August 3, 2006" refers to the Declaration Under Penalty Of Perjury Of Plaintiff-Appellant, Robert S. Fastov, Filed In Support Of His Petition For Rehearing With Respect To The Order Of This Court Filed August 3, 2006 Granting Defendants'/ Appellees' Motion To Dismiss Plaintiff's/Appellant's Appeal

"dec. filed supporting my reply to Christie's opposition to my motion" refers to the Declaration Under Penalty Of Perjury Of Robert S. Fastov Filed In Support Of Plaintiff's Reply To Defendant's Memorandum In Opposition To His Motion For An

Extension Of Time To File A Notice Of Appeal filed on May 12, 2006

"dec. filed supporting my surreply to Christie's reply in further support of its motion to dismiss appeal" refers to the Declaration Under Penalty Of Perjury Of Robert S. Fastov Filed In Support Of Plaintiff/Appellant's Surreply To Appellee's Reply In Further Support Of Their Motion To Dismiss Appeal filed in this Court on May 12, 2006

"Electronic Filings" refers to the Notice of Electronic Filings that Christie's is seeking by motion to have this Court include in the record, but which were not filed by Christie's in the U.S. District Court for the District of Columbia in support of Defendant's Memorandum In Opposition To Plaintiff's Motion For An Extension Of Time To File A Notice Of Appeal, even though Christie's had such Notices in their possession at the time Christie's filed its Memorandum In Opposition to such Motion, and it appears that Judge Stafford had no opportunity to consider such Notices prior to his Order of June 8, 2006 denying Plaintiff's Motion

"I" refers to Plaintiff-Appellant Robert S. Fastov

"judgment" refers to the judgment in favor Christie's, granting Christie's summary judgment, entered by the United States District Court on February 22, 2006

" my memorandum supporting my motion" refers to Plaintiff-Appellant Robert S. Fastov's Memorandum In Support Of His Motion For An Extension Of Time To File A Notice Of Appeal filed on April 23, 2006

"my motion" refers to Plaintiff-Appellant Robert S. Fastov's Motion For An Extension Of Time To File A Notice Of Appeal filed on April 23, 2006

"my reply to Christie's opposition to my motion" refers to the Reply of Plaintiff Robert S. Fastov to Defendants' Memorandum In Opposition To His Motion For An Extension Of Time To File A Notice Of Appeal filed on May 12, 2006

"order" refers to the Order of Judge William Stafford, U.S; District Court Judge denying Plaintiff's Motion For An Extension Of Time To File A Notice Of Appeal entered on June 8, 2006

"order of February 22" refers to the Order of Judge William Stafford, U.S; District Court Judge entered on February 22, 2006 granting Christie's summary judgment

"Pl. Br." refers to the Plaintiff/Appellant Robert S. Fastov's Brief Appealing The Decision Of The District Court Denying Plaintiff/Appellant's Motion For An Extension Of Time To File A Notice Of Appeal filed in this Court

"the Judgment" refers to this Court's Judgment of April 10, 2007

"this Court" refers to the United States Court Of Appeals, District of Columbia Circuit

"V.C." refers to the Verified Complaint that plaintiff Robert S. Fastov filed on March 21, 1997 in the United States District Court For The District Of Columbia

I. Statement required by F. R. App. P., 35 (b), which also makes clear that I am entitled to have this Court reverse the court's Order denying my motion for extension of time to file a notice of appeal

The panel decision should be reviewed en banc, as it raises and involves both of the provisions of F. R. App. P., 35 (b) as follows: The panel decision

conflicts with numerous decisions of this Court and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. The core of this conflict is that this Court in its Judgment of April 10, 2007 ("the Judgment," Exhibit A hereto), affirming the court's order denying my motion to extend time for filing a notice of appeal, ignored my very clearly asserted argument in my brief (Argument II, at p. 18) that Christie's waived its right to present an argument on an issue on which I am clearly entitled to prevail (as detailed below), as Christie's did not make this argument in the court below. Such Judgment conflicts with numerous cases of this Circuit that I cite below which stand, *inter alia*, for doctrines, such as "[W]e ordinarily do not entertain arguments not raised by parties"); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) (under "well settled" rule, "issues and legal theories not asserted at the court level ordinarily will not be heard on appeal" and "Ordinarily we do not consider non-jurisdictional issues that litigants didn't raise and that the court didn't resolve. (Emphasis added.)." Such Judgment not only did not address and resolve this argument in my favor, it failed to raise or address the "exceptional circumstances," which under these doctrines, might exempt a litigant from the preclusive effect of these "waiver" principles and requirement. Hence, the conflict.

In elaboration of the foregoing, in my brief, I made clear that Christie's was barred from arguing before this Court that: (i) I, a *pro se* litigant, was not entitled to an extension of time to file a notice of appeal under F. R. App. P., Rule 4 (a) (6) and 28 U.S.C. §2107 (c); and (ii) my motion seeking this

relief should have been denied. In addition, I did not believe that Christie's should be entitled to argue [disingenuously] to this Court that in the court's June 8, 2006 order, the court sustained Christie's position on this issue. My predicates for making these assertions are: (i) Christie's had waived their right to make these arguments, as Christie's did not make these arguments in the court below in their opposition to my motion or via any other written document (there was no hearing or oral argument in the court), and (ii) in its order, the court did not address or resolve my Rule 4 (a) (6), F. R. App. P. and 28 U.S.C. §2107 (c) arguments in my such motion. In slang parlance, I was entitled to "slam dunk" reversal on this issue, because of these considerations, and because I complied with all of the requirements of this Rule and statute (discussed, in next paragraph).

At pp. 10-11 of my brief, I provided the heart of my argument regarding my entitlement to relief under Rule 4 (a) (6), F.R.App.P. and 28 U.S.C. §2107, the substance of which I had presented to the court in my memorandum supporting my motion:

> I. The court did not address in its order of June 8, 2006 my assertions and arguments that I am entitled to have the court reopen or extend the time to file a notice of appeal pursuant to Rule 4 (a) (6), F.R.App.P. and 28 U.S.C. §2107....I argued, in essence, on p. 12, [of my memorandum supporting my motion (docket # 125; Ap. 444)], that I was entitled to 28 U.S.C. §2107 (c) and Rule 4 (a) (6) relief, because I did not receive from the clerk and was not formally served with notice of entry of the judgment within 21 days from the

date of such entry of judgment; my motion had been filed within "180 days after entry of the judgment or order;" and Christie's would not be prejudiced by allowing me to file a late notice of appeal. It is also clear that, given my receipt or Rule 77 (d) service of notice of entry of judgment by letter on April 14, 2006, and, allowing for two intervening weekend days, my Motion For An Extension Of Time To File A Notice of Appeal on April 23, 2006 (Docket # 125; Ap. 441) also met the 7 day filing requirement of this statute and Rule regarding such Motion filed on April 23, 2006. (Emphasis added; *see* fn. 17, p. 11 of my brief)

At pp. 17-18 of my brief, I cited and discussed *Benavides v. Bureau of Prisons*, 79 F.3d 1211 (D.C. Cir. 1996) a case which set up the conflict and involved a would be *pro se* appellant, like myself.

II. Christies' waived in the court any right Christie's had to attack in this Court my assertions and arguments that I am entitled to relief under Rule 4 (a) (6), F.R.App.P. and the relevant provisions of 28 U.S.C. §2107

Benavides v. Bureau of Prisons, 79 F.3d 1211 (D.C. Cir. 1996) makes clear that by Christie's not objecting to or arguing with my factual and legal arguments in Christie's opposition to my motion filed on May 5, 2006 (Ap. 498-510), Christie's waived any right Christie's had to raise these Rule 4 (a) (6) and 28 U.S.C. §2107 (c) issues in this Court pertaining to whether or not I, a *pro se* litigant, was entitled to an extension of time to file a late notice of appeal under

Rule 4 (a) (6) and 28 U.S.C. §2107[187]The key passage in *Benavides* at 79 F.3d at 1215 is:

> The Government's remaining objections to the reopening of the period for filing an appeal have not been preserved. Benavides asserted in the motions here relevant both that he did not receive, from either the clerk or another party, notice of the order denying his motion for further relief within 21 days of its issuance, and that the BOP would not be prejudiced by reopening the period for filing a notice of appeal. The Government did not respond to Benavides' initial 4 (a) (6) motion, and in its opposition to his motion to alter or amend, the Government did not contest either the possibility of prejudice or Benavides' representations concerning non-receipt. The Government has therefore waived any objection it may have on those grounds to Benavides' getting relief under Rule 4 (a) (6) (Emphasis added.).

Thus, Christie's cannot contest in this Court my Rule 4 (a) (6) and 28 U.S.C. §2107 argument is inappropriate. I also have noted that Christie's was also derelict in its failing to serve a copy of the judgment on me and afford itself of the protections regarding a Rule 4 (a) (6) claim of

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[187] [fn 31, pp. 17-18 of my brief] In *Benavides*, which, like this case, involved a *pro se* plaintiff, this Court reversed a court order holding that a *pro se* litigant was not entitled. to a reopening of the period for filing of an appeal in a manner, which is almost on "all fours" with this case. The *Benavides* court judge erroneously construed Benavides' (the *pro se* plaintiff's) motion, as one based on Rule 4 (a) (5), F.R.App.P., which, according to this Court, was inappropriate, and should have construed it as being based on Rule 4 (a) (6).

non-receipt of the judgment afforded me by the 1991 amendments to [F. R. Civ. P.] Rule 77 (d)

The Judgment ignored the foregoing argument; thus, the judgment conflicts with this Court's long standing "waiver" policy and decisions, such as *Benavides* and other decisions such as *Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) and other cases, discussed below. Totten held:

> Ordinarily, arguments that parties do not make on appeal are deemed to have been waived. *See, e.g., Ark Las Vegas Rest. Corp. v. NLRB,* 334 F.3d 99, 108 n. 4 (D.C. Cir. 2003) (argument petitioner raised for first time at oral argument is "waived because it was not raised in [petitioner's] briefs"); *Narragansett Indian Tribe v. National Indian Gaming Comm'n,* 158 F.3d 1335, 1338 (D.C. Cir. 1998) ("[W]e ordinarily do not entertain arguments not raised by parties"); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) (under "well settled" rule, "issues and legal theories not asserted at the court level ordinarily will not be heard on appeal"). The court has authority to remedy errors *sua sponte* in "exceptional circumstances" — when they "seriously affect the fairness, integrity, or public reputation of judicial proceedings," *United States v. TDC Mgmt. Corp.*, 288 F.3d 421, 425 (D.C. Cir. 2002) (quotation omitted) — but no one has suggested that this is such a case. A party's failure to pursue one of several available lines of argument is hardly an "error" of the sort that would warrant exercising our narrowly circumscribed remedial authority. (Emphasis and bold face added.).

Other cases have also asserted and applied the "waiver" argument and precluded a party from asserting before this Court an argument that had not been made or an issue which had not been raised in the court below.[188] The Judgment conflicts with these cases, as well. *Totten* cited and relied upon *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-1085 (D.C. Cir. 1984):

> It is well settled that issues and legal theories not asserted at the court level ordinarily will not be heard on appeal [fn38][189]...Decisions in this Circuit have consistently followed a practice of dismissing appeals brought on grounds not asserted in the trial court: This is not a mere technicality but is of substance in the administration of the business of the courts. Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below.

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[188] *See, e.g., Marymount Hospital v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994). ("Marymount failed both in the court and before the Board to raise this argument. Arguments not made below are deemed waived, and, absent 'exceptional circumstances' not present here, it is not our practice to entertain issues first raised on appeal. (Emphasis added.)"); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, fn. 13 (D.C. Cir. 2002); *U.S. v. BCCI Holdings (Luxembourg), S.A.*, 73 F.3d 403, fn. 2 (D.C. Cir. 1996); *Souders v. Washington Metropolitan Transit Auth.*, 48 F.3d 546, 550, fn. 5 (D.C. Cir. 1995); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 & fn. 5 (D.C. Cir. 1992); *Hobson v. Wilson*, 737 F.2d 1, 31 (D.C. Cir. 1984).

[189] In fn. 38, the Court cited numerous cases, including Supreme Court decisions, which antedated *District of Columbia* and make clear that the *District of Columbia* principles are deeply engrained in our judicial system and are a significant tenet of appellate practice.

Almost every case would in effect be tried twice under any such practice. While the rule may work hardship in individual cases, it is necessary that its integrity be preserved....Although in exceptional circumstances, where injustice might otherwise result, we have the discretion to consider questions of law that were neither raised below nor passed upon by the court,.... we do not believe that this case warrants departure from the normal rule. (Emphasis and bold face added.)."

33 cases have cited *District of Columbia* essentially for the proposition that an issue or argument not raised in the court will not be considered by this Court and have refused to hear such argument or issue in this Court.[190] Thus, the

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[190] *Gaviria v. Reynolds,* 476 F.3d 940, 946 (D.C. Cir. 2007); *Felter v. Kempthorne,* 473 F.3d 1255, 1261 (D.C. Cir. 2007; *Hussain v. Nicholson,* 435 F.3d 359, 364 (D.C. Cir. 2006); *Horowitz v. Peace Corps,* 428 F.3d 271, 282(D.C. Cir. 2005), *U.S. Ex Rel. Totten v. Bombardier Corp.,* 380 F.3d 488, 497 (D.C. Cir. 2004); *Ben-Kotel v. Howard University,* 319 F.3d 532 (D.C. Cir. 2003); *Ned Chartering & Trading v. Rep. Of Pakistan,* 294 F.3d 148 (D.C. Cir. 2002); *Hall v. Clinton,* 285 F.3d 74 (D.C. Cir. 2002); *Lomont v. O'neill,* 285 F.3d 9, fn. 8 (D.C. Cir. 2002); *U.S. Ex Rel. Settlemire v. Dist. Of Columbia,* 198 F.3d 913, 920 (D.C. Cir. 1999); *Carpenter v. Federal Natl. Mortgage Assoc.,* 174 F.3d 231, fn. 4 (D.C. Cir. 1999); *Peralta v. U.S. Attorney's Office,* 136 F.3d 169, 174 (D.C. Cir. 1998); *Strawberry v. Albright,* 111 F.3d 943, 946 (D.C. Cir. 1997); *Kennecott Utah Copper C. v. U.S. Dep. Of Int.,* 88 F.3d 1191,1203 (D.C. Cir. 1996); *Mccutchen v. U.S. Dept. Of Health & Human Serv,* 30 F.3d 183, 187 (D.C. Cir. 1994); *Boehner v. Anderson,* 30 F.3d 156, 162 (D.C. Cir. 1994); *Atlanta Col. Of Med. & Den. Careers v. Riley,* 987 F.2d 821, 832 (D.C. Cir. 1993); *Henderson v. Lujan,* 964 F.2d 1179, 1183 (D.C. Cir. 1992); *Macht v. Skinner,* 916 F.2d 13, fn. 5 (D.C. Cir. 1990); *Foremost-Mckesson v. Islamic Republic Of Iran,* 905 F.2d 438,

Judgment conflicts with *District of Columbia* and

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453 (D.C. Cir. 1990); *Federal Elec. Corp. v. Carlucci*, 866 F.2d 1530, 1533 (D.C. Cir. 1989); *Strang v. U.S. Arms Control & Disarmament Ag.*, 864 F.2d 859, 862 (D.C. Cir. 1989); *In Re Sealed Case*, 838 F.2d 476, fn. 6 (D.C. Cir. 1988); *U.S. v. Morris*, 836 F.2d 1371, 1374 (D.C. Cir. 1988); *National Wildlife Federation v. Burford*, 835 F.2d 305, 318 (D.C. Cir. 1987); *Berry v. District Of Columbia*, 833 F.2d 1031, 1033 (D.C. Cir. 1987); *In Re Korean Air Lines Disaster Of Sep. 1983*, 829 F.2d 1171, fn. 17 (D.C. Cir. 1987); *Conax Florida Corp. v. U.S.*, 824 F.2d 1124, 1131 (D.C. Cir. 1987); *Nat. Federation Of Fed. Emp. v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987); *Fritz v. Honda Motor Co., Ltd.*, 818 F.2d 924, 926 (D.C. Cir. 1987; *Laxalt v. Mcclatchy*, 809 F.2d 885, fn. 26 (D.C. Cir. 1987); *Director, Off. Of Wkrs' Comp. v. Edward Minte*, 803 F.2d 731, 736 (D.C. Cir. 1986); *Gatoil (U.S.A.), v. Wash. Metro. Area Transit*, 801 F.2d 451, fn. 1 (D.C. Cir. 1986); *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, fn. 3 (D.C. Cir. 1986); *Int'l U., United Auto., Aero. & Agr. v. Brock*, 783 F.2d 237, 251 (D.C. Cir. 1986); *Doe v. Digenova*, 779 F.2d 74, 89 (D.C. Cir. 1985); *Eli Lilly And Co. v. Home Ins. Co.*, 764 F.2d 876, fn. 5 (D.C. Cir. 1985). *See also Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983) ("[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them,") and its many progeny. *See, e,g., Monarch Life Ins. Co. Elam*, 918 F.2d 200, 203 (D.C. Cir. 1990) ("As Monarch did not raise the issue on appeal, however, we do not address it. *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983). Monarch's vague, arguable references to the point in the court proceedings do not, of course, preserve the issue on appeal. See *id.* at 175-76"); *Barr v. Clinton*, 370 F.3d 1196, 1203-1204 (D.C. Cir. 2004) (In holding that this Court would not address Barr's issue, citing *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983), this Court observed: "Barr neither raised this issue in response to Flynt's First Amendment arguments nor cited any of the relevant authority either before the court or here. Indeed, nothing in Barr's appellate briefs can arguably be read as encompassing the issue."); *Iturralde v. Comptroller Of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003).

these 33 cases. *Kramer v. Gates*, 05-5385, Loislaw, 7 (D.C. Cir. March 6, 2007) very recently reaffirmed *Totten*, stating in part:

> Next, we must address whether we may resolve this case on the impropriety of Rule 60(b)(6) relief when the appellant failed to raise such an objection. Ordinarily we do not consider non-jurisdictional issues that litigants didn't raise and that the court didn't resolve (Emphasis and bold face added.), citing *Totten.*

Because Christie's did not challenge my above described arguments and legal theories predicated on Rule 4 (a) and 28 U.S.C. §2107 in the court, and the court ignored and did not rule or "pass upon" such arguments, the "court didn't resolve" this issue; hence, per *Kramer* and *Totten.* this Court should not consider the above-described Christie's arguments or legal theories in this Court. Thus, there is another conflict between the Judgment (April 10, 2007) and another, very recent and almost contemporaneous decision of this Court (March 6, 2007).

The Judgment is also inconsistent and conflicts with other principles of appellate review, which make clear that this Court will not consider issues and arguments: (i) not made in the opening appellate brief, even if the issue was raised in the court below, (ii) first made in a reply brief; (iii) not adequately briefed, or (iv) first raised in oral argument.[191]

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[191] *See, e.g., U.S. Ex Rel. Settlemire v. Dist. Of Columbia,* 198 F.3d 913, 920 (D.C. Cir. 1999); *United States v. Whren,* 111 F.3d 956, 958 (D.C. Cir. 1997) (court need not consider issues that appellant fails to raise in opening appeal brief, although issue was raised below), cert. denied, 118 S.Ct. 1059 (1998);

District of Columbia asserted that: "in exceptional circumstances, where injustice might otherwise result, we have the discretion to consider questions of law that were neither raised below nor passed upon by the court," and *Totten* asserted: "The court has authority to remedy errors *sua sponte* in "exceptional circumstances" — when they "seriously affect the fairness, integrity, or public reputation of judicial proceedings." In my research, I had difficulty finding a case in which this Court discussed these principles and found that such "such extraordinary circumstances" existed, but there were cases, in which this Court interpreted actions and arguments made in the court below to be sufficient to cause this Court to entertain the arguments in question. However, there are no exceptional circumstances in this case that warrant this Court hearing and ruling on Christie's above-described arguments. Indeed, the above described purposes (to hear and rule on such waived arguments "where injustice might otherwise result" or "would "seriously affect the fairness, integrity, or public reputation of judicial proceedings) of this "exceptional circumstances" doctrine would be much better served by this Courts not entertaining and ruling on Christie's such

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McBride v. Merrell Dow & Pharmaceuticals, Inc., 800 F.2d 1208, 1211 (D.C. Cir. 1986) ("[c]onsidering an argument advanced for the first time in a reply brief . . . is not only unfair to the appellee but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered" and this Court will not consider issues that are "not adequately briefed on appeal") and its progeny. See, e.g. *U.S. v. Caicedo-Llanos*, 960 F.2d 158, 164 (D.C. Cir. 1992). Similarly, this Court will not rule on an argument, when it is raised at oral argument, but not in briefs. *Rest. Corp. v. NLRB*, 334 F.3d 99, 108, fn.. 4 (D.C. Cir. 2003).

arguments. Injustice, theoretically, could be inflicted on me, not Christie's, if this Court hears and accepts Christie's disingenuous arguments.

Similarly, the considerations of "fairness, integrity, or public reputation of judicial proceeding" strongly favor this Court refusing to hear and rule on Christie's arguments. Christie's has been represented by a very large New York-based law firm, Hughes, Hubbard & Reed, L.L.P., in this case, and it is typical for this firm to assign to assign more than two lawyers to preparing Christie's oppositions or responses to my oppositions, motions, pleadings and other documents.[192] These attorneys, obviously, were well aware that I made my arguments based on Rule 4 (a) (6) and 28 U.S.C. 2107 in my motion and supporting documents and reply and supporting documents to Christie's opposition. I very specifically asserted and argued at p. 12 of my memorandum in support of my motion that I had complied with such Rule and statute and was entitled to have the time extended for me to file my Notice of Appeal. Quite obviously, these attorneys did not address or oppose my such arguments out of gross negligence. Rather, they made a strategic/tactical decision not to draw the court's attention to my arguments in the hope that the district could would rule in Christie's favor on my Rule 4 (a) (5) arguments (which may well have occurred), and I might not file or might lose my appeal on this issue, or, perhaps, even worse, I might die (Christie's attorneys knew that I had significant healthy problems and was a "senior" person.).

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[192] I know this fact, because I have reviewed part of Christie's attorneys fee computations, listing the hours and names of the attorneys and on what project such attorneys generated fees.

Moreover, Christie's attorneys did not meet head on or overcome my above waiver argument, per *Benavides,* in their reply brief filed in this Court,[193]

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[193] Christie's attorneys only devote pp. 21-26 of such reply brief to my Rule (4) (a) (6) (but ignore and did not address my 28 U.S.C. § 2107 (c)) arguments. Their "attack" on *Benavides*, which they relegated to a fn. 10 discussion, is largely irrelevant and very weak. The balance of their argument was largely based on an attack on the credibility, truthfulness and integrity of my assertion made under Declaration Under Penalty of Perjury filed in the court below, that I was ignorant of the existence of the judgment executed on February 22, 2006, until April 2006; did not receive a copy of the February 22, 2006 judgment c. February 22, 2006 or immediately thereafter; and the clerk did not mail, and I did not receive from the clerk a copy of such judgment until April 14, 2006. They also, in effect, trumped up arguments as to why the entry of the judgment on the Docket of the judgment of February 22, 2006, proved that the clerk mailed a copy of such judgment to me c. February 22, 2006. Moreover, and perhaps, most egregiously, they specifically hung their hat on the court's Rule 4 (a) (5) determinations (not Rule 4 (a) (6) determinations) that the court did not believe, in effect, I was truthful and did not possess the requisite truthfulness, credibility and integrity; and thus, the court disbelieved my declaration assertions. They make this argument notwithstanding the fact that Christie's receives the court documents on the day they are entered on the docket by electronic filing, and I, as a *pro se* litigant, am required to wait until the clerk deposits the hard copy of the document with snail mail (US Postal Service) and I receive it in my mail deliveries, which are, at times, delayed. I subsequently experienced another instance of the clerk's office failing to send me a copy of a key court document on a timely basis. I did not receive from the clerk a copy of the court's order granting Christie's attorney's fees, until a week after it was entered, and the assistant clerk with whom I spoke told me that the assistant clerk who was responsible for mailing to me such Order on the date it was entered, neglected to do so and did not mail it to me until 5 days after it was entered. Christie's attorneys made this argument when they knew that the court

even though I raised this waiver issue four square and vigorously in my brief at pp. 17-18 as argument II. If this Court were to hear Christie's arguments, it would be rewarding Christie's attorneys for their strategic/tactical blunder. It would help Christie's attorneys to "steal" this case, without this Court's reviewing the court's order granting Christie's summary judgment, which Christie's should lose. Such a decision would not further "the fairness, integrity, or public reputation of judicial proceedings." Rather, it would seriously impugn, the fairness, integrity and public reputation of this Court.

III. Other reasons for this Court to grant me a rehearing and to reverse the court's order denying me an extension of time to file a notice of appeal.

A. This Court's judgment is flawed

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had no basis whatsoever for assessing and making a plausible, credible and realistic decision concerning my character, truthfulness, integrity and credibility, other than Christie's attorneys' unwarranted and unjustified attacks in their pleadings and other filed documents on my character, truthfulness, integrity and credibility. They then proceeded to manufacture for this Court the court's Rule 4 (a) (6) (but not 28 U.S.C. § 2107) determinations and findings, as the court did not address or resolve my arguments based on such Rule and statute in its June 8, 2006 order. The court's determinations were based on Christie's attorneys disingenuous and largely unsupported attacks on me. The court's Rule 4 (a) (5) findings had virtually no credible basis in the record. Moreover, the court's such determinations had no credibility, as the court had no ability or capacity to make assessments of my character, demeanor, truthfulness, integrity and credibility, because it never laid eyes on me or heard me, as the court never held a hearing or meeting in this matter.

In this Court's per curiam Judgment filed on April 10, 2007, this Court affirmed the court's order of June 8, 2006. The sole and total predicate for this Court's judgment was:

> The court did not abuse its discretion in denying appellant's motion for an extension of time to file a notice of appeal. Cf. Johnson v. Lehman, 679 F.2d 918 (D.C. Cir. 1982) (abuse of discretion regarding grant of Rule 4 (a) (5) motion); see Tooling Research, Inc. v Tri-onics, 1 F. 3d 1231 (1st Cir. 1993) (abuse of discretion regarding denial of a Rule 4 (a) (6) motion).

Tooling Research, an unpublished decision, is totally irrelevant and does not provide any support whatsoever for this Court' judgment affirming a denial of my motion for an extension of time to file a notice of appeal. All that *Tooling Research* stated regarding Rule 4 (a) (6), was the following totally irrelevant and unsupportive statement.

> We decline to determine whether the court abused its discretion in denying appellant's motion to reopen the time for appeal, Fed. R. App. P. 4(a)(6), because we conclude that the time for appealing has not yet commenced to run and that therefore a timely appeal may be filed (Emphasis added.).

Indeed, *Tooling Research* permitted the would be appellant to appeal, treating such appellant's Rule 4 (a) (6) motion, which was denied, as a notice of appeal!!![194] Thus, *Tooling Research* supports me, not

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[194] "As no purpose would be served by requiring appellant to file yet another piece of paper labelled notice of appeal, we will treat the August 25, 1992 motion [under Rule (4 (a) (6) as a notice of appeal."

the judgment of this Court. The only statement relevant to Rule 4 ((a) (5) in *Johnson* appears at 679 F.2d at 919-920:

> Turning to the last argument first, there is no indication in the record that the lower court abused its discretion in granting the Secretary's motion for filing a late notice of appeal under Rule 4(a)(5) of the Federal Rules of Appellate Procedure (Emphasis added.).

Again, this Court's judgment cited a case, which supports my position more than the views expressed in the judgment. To be blunt, the judgment's citation to these two cases as this Court's sole justification for affirming the court's order, verges on the incompetent.

B. I have already addressed the substance of my Fed. R. App. P., Rule 4(A)(6) and 28 U. S. C. 2107 (C) arguments in my brief and refer this Court to pp. 9-18 for other details concerning my argument, which further buttress my argument that I am entitled to relief under this rule and statute

C. The court abused its discretion in determining there was no excusable neglect under Rule 4 (a) (5), F.R.App.P. and 28 U.S.C. §2107 (c) and should have found that my March 30, 2006 notice of appeal (Ap. 301) from the corrected order of February 27, 2006 (Ap. 250-277) was timely and valid under F.R.App.P. 4(a) (1) and 28 U.S.C. §2107 (a).

See pp. 18-30 of my brief. However, in essence, I cited *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993) in which the Supreme Court, as interpreted and applied by virtually all Circuit Courts to Rule 4

(a) (5),[195] made clear that the courts should take into account "all relevant circumstances surrounding the party's omission" and provided additional and significant guidance,[196] which makes clear that my assertions regarding my actions and inactions, as set forth in my Statement of Facts (pp. 2-9 of my brief) should cause this Court to reverse the court's denial of my *pro se* motion to extend time to file a notice of appeal. I had absolutely no experience as an appellant during my career, which was only active from 1968-1985; thus, I had no knowledge or experience regarding notices of appeal. I filed my first notice of appeal on March 30, 2006, which was 30 days from the date the court executed the corrected order on February 27, 2006, which I believed to be permissible given the language of Rule 4 (a) (1) and 28 U.S.C. §2107 that permitted filing a notice of appeal from a judgment or order. I was not served per Rule 77 (d), F.R.Civ.P. and did not receive

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[195] Per *Webster v. Pacesetter, Inc., 270 F. Supp.2d 9, fn. 5* (D. D.C. 2003): "[E]very circuit court that has considered the question has extended *Pioneer* to determinations of excusable neglect under Rule 4. *See Stutson v. United States,* 516 U.S. 193, 195 (1996) (listing cases in the First, Second, Fifth, Eighth, Ninth and Tenth Circuits."

[196] These include... the danger of prejudice to the debtor [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." At 507 U.S. 388, the Court also stated re "neglect:" "The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness....Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control (Emphasis added)."

from the clerk a copy of the court's judgment of February 22, 2006, until April 14, 2006. As soon as I learned of a judgment's existence, as a matter of prudence, I filed a second notice of appeal from the judgment on April 13, 2006. The court failed to apply the *Pioneer* standard and ignored relevant facts regarding "all relevant circumstances" which supported my claim. Instead the point of departure and key aspect of the court's order denying my motion was his determination that I was, in effect, a liar, but did so, at Christie's attorneys' urging, even though the court had no opportunity to assess my character, truthfulness, integrity, credibility and motivations, as the court has never seen or heard me in a hearing or otherwise. I should have been given a passing grade under *Pioneer's* "all relevant circumstances surrounding the party's omission" test, as detailed in my footnote.

D. Throughout this litigation, Christie's attorneys attacked my motivations and character, the classic ploy used by an attorney, when the attorney knows that he or she cannot prevail on the merits. They succeeded on motions for summary judgment and attorney's fees, because they also distorted and misrepresented the (highly disputed) facts and attacked me with virtually no credible, relevant evidence, and the court accepted Christie's unsupported factual fantasies and character assassination of me without question or cavil. This Court ought to give me an opportunity to argue the summary judgment issue on the merits before this Court. If I prevail, this Court will have done equity and justice, but, in all events, it should give me the opportunity to do so.

A by product of my prevailing on summary judgment, is that this Court will almost certainly not have to deal with my appeal of the court's order of March 14, 2007, awarding Christie's attorney's fees, which is a gross abuse of discretion and manifests clear errors of law.[197] In this order, the court used as a linch pin, made at Christie's attorneys' urging, a similar adverse determination with regard to my character, truthfulness, integrity, credibility and motivations, and found that I was, in effect, a liar, acted in bad faith toward Christie's, intended to harass Christie's and acted unreasonably and vexatiously. I reiterate, that the court made these determinations, even though the court had no opportunity to assess me or these aspects of my personality and character. Indeed, the court committed reversible error by denying my motion for a hearing on Christie's attorney's fees motion, especially given the court's total lack of exposure to me, which is key to the court's determinations concerning my character and motivations, upon which the court centered his order.[198] This Court

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[197] See ¶ 1 of my Declaration Under Penalty Of Perjury appended hereto as Exhibit B ("Dec."), which reprints the Table of Content of my opposition to Christie's application for attorney's fees and expenses.

[198] *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, (1980) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-46 (1991) (approving attorneys' fees per inherent power, but only "after full briefing and a hearing," and noting due process applies and court exercises its inherent powers with restraint.); *United States v. Birtle*, 521 F.2d 134 (9th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976) (holding that it is reversible error to deny a hearing on

should assess carefully the implications of the foregoing and the fact that the court, a judge who is based in Florida, did not assume responsibility for this case until February 24, 2005 (almost 8 years after the complaint was filed) has never even met the parties, let alone hold a hearing; and thus. had no plausible, realistic and credible way of assessing my character and motivations.[199] Nevertheless, the court made these assessments about me as the keystone for 3 separate orders that have substantially damaged me.

In the case of attorney's fees, Christie's is seeking $630,043 for virtually all of the fees and expenses Christie's has incurred for two acts that the court cited in its order sanctioning me: (1) a settlement letter, which threatened Christie's with litigation if settlement were not achieved, that was written by me on July 2, 1994, almost 3 years before the complaint was filed. Such letter is protected and given immunity under the *Noerr=Pennington* doctrine.[200](2) Two sets of documents of 2000, which

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monetary sanctions); *Browning v. Kramer*, 931 F.2d 340, 346 (5th Cir. 1991); *Kirshner v. Uniden Corp. Of America*, 842 F.2d 1074, 1082 (9th Cir. 1988), *Sakon v. Andreo*, 119 F.3d 109, 114 (2nd Cir. 1997);: *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 708-09 (2d Cir. 1985) *cert. denied*, 475 U.S. 1067 (1986); *In re Clark*, 223 F.3d 859, 864 (8th Cir. 2000); *Jensen v. Fed. Ld. Bk. of Omaha*, 882 F.2d 340, 341 (8th Cir. 1989).

[199] See ¶ 2 of my Dec., appended hereto. The court also denied my motion for leave to file a surreply.

[200] *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983); *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 930-932, 934-935, 936-938; 942 (9th Cir. 2006); *Globetrotter Software v. Elan Computer Group*, 362 F.3d 1367, 1375-1376 (Fed. Cir. 2004); *A.D. Bedell Whol. Co. v. Phillip Morris Inc.*, 263 F.3d 239, 254

were filed when Timothy Russell and his law firm were my counsel of record. Such documents were criticized for being too long; however, there is ample, reasonable justification for their length, but which, at the worst, were exercises in negligence, carelessness or stupidity and not bad faith or vexatious and unreasonable conduct multiplying the proceedings, as is required to impose attorney's fees as a sanction under the court's inherent authority, per *Chambers, supra,* and 28 U.S.C. § 1927.[201]

Re the court's order granting Christie's summary judgment, this, too, was also driven by the court's inappropriate assessment of me and my character and motivations. The court found that Christie's was entitled to summary judgment, even though I disputed virtually every material fact that Christie's

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(3rd Cir. 2001); *Primetime 24 Joint Venture v. Natl. BC Co.*, 219 F.3d 92, 100 (2nd Cir. 2000); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1559-1560-1562 (11th Cir. 1992); *In Re IBP Confidential Bus. Documents Lit.*, 755 F.2d 1300, 1310 (8th Cir. 1985; *Scott v. Hern*, 216 F.3d 897, 914 (10th Cir. 2000), citing cases and listing of kinds of common law torts, to which *Noerr-Pennington* applied, as of 2000, which are largely the basis for my claims in this case). Re cases denying attorney's fees under *Noerr-Pennington, see, e.g, DIRECTV, Inc. v. Lewis*, 03-CV-6241-CJS-JWF, 2005 U.S. Dist. LEXIS 8187 at *13-19 (W.D.N.Y. April 29, 2005); *Southwest Marine v. Campbell Indus., 616 F. Supp. 253*, 258 (S.D.Cal. 1985); *Johnson v. Con-Vey/Keystone, Inc.*, 856 F. Supp. 1443 (D. Or. 1994). See ¶¶ 3-4 of my Dec. appended hereto re the Poltimore letter.

[201] See ¶¶ 5-11 of my Dec. appended hereto, which discusses pertinent considerations regarding these documents. In my opposition to Christie's application for $630,043 in fees and expenses, I made 11 separate legal arguments, as to why Christie's is not entitled to this sum or any smaller sum under the law pertaining to the power to sanction under the court's inherent authority and 28 U.S.C. § 1927.

asserted and added some other key material facts, which Christie's omitted in their statement and which strengthened my case against summary judgment even further. I had credible contemporaneously generated documents, which supported my case. Christie's had virtually no documentary support of this nature. Hornbook law, that does not warrant citations, indicates that a grant of summary judgment under these circumstances is reversible error.[202] The court also totally ignored the obligations that Christie's owed me, as an agent/fiduciary under the precedent setting case, *Cristallina v. Christie,* 117 A.D. 2d 284, 502 N.Y.S.2d 165, 168-173 (1st Dept 1986), which Christie's breached in many

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[202] The court also held that my claims were barred by the 3 year D.C. Statute of limitations. However, the court clearly erred as it did not analyze the relevant facts under the doctrines of "equitable estoppel," "the continuing or ongoing tort," "equitable tolling," "discovery," "fraudulent concealment," all doctrines limiting, conditioning and precluding the 3 year Statute of Limitations from barring my claims. *See, e.g., Goldman v. Bequai,* 19 F. 3d 666 (D.C. Cir. 1994); *Williams v. Central Money Co.*, 974 F. Supp. 22 (D. D.C. 1997); *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981); *Farris v. Compton*, 652 A.2d 49 (D.C. Ct. App. 1994); *Hobson v. Wilson*, 737 F.2d 1, (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 D.C. Cir. 1989); *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192 (D.C. Ct. App. 1984); *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231 (1959); *Knight v. Furlow*, 553 A.2d 1232 (D.C. Ct. App. 1989); *Williams v. Mordkofsky*, 901 F.2d 158 (D.C. Cir. 1990); *Hudak v. Economic Research Analysts*, 499 F.2d 996 (5th Cir. 1974); *Interdonato v. Interdonato*, 521 A.2d 1124 (D.C. Ct. App. 1987); *William J. Davis, Inc. v. Young*, 412 A.2d 1187 (D.C. Ct. App.1980), *Firestone v. Firestone,* 76 F.3d 1205 (D.C. Cir. 1996); *Diamond v. Davis*, 671 A.2d 905 (D.C. Ct. App. 1996). See ¶¶ 12-13 of my Dec. appended hereto re the Statute of Limitations legal and factual considerations.

ways, and the assertions I made re Christie's and Sotheby's conspiracy and fixing of fees they charged consignors, like me, that began on the same week in 1993, when I first approached Christie's to consign my Schindler painting and continued to the year 2000. Christie's and Sotheby's each had to pay approximately $276 million to settle with their U.S. and non-U.S. consignors.[203]

Summary judgment and this case substantively turn on whether Christie's insistence that Dr. Gerbert Frödl was Christie's outside expert on Emil Jakob Schindler (Austrian 1842-1892), the artist who created my painting (which, as an authentic work by Schindler was worth approximately $150,000 in 1993, when I consigned the painting to Christie's); a Frödl positive opinion on the authenticity of my painting was a *sine qua non* for Christie's to offer my painting for sale; and Dr. Heinrich Fuchs was not Christie's expert on Schindler, and his expert positive opinion on authenticity would not suffice for Christie's. The following is a significant truncation regarding the relevant facts and their significance in ¶¶ 16-22 of my Dec. appended hereto. Starting on April 1 and 2, 1993, two Christie's officials told me that Frödl had opined to Christie's that my Schindler painting was not authentic and was a fake, an opinion which Christie's told me they shared, and which caused Christie's to withdraw my painting from sale. This position was reiterated in two conversations I had with two her Christie's officials, Nicholas Maclean of

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[203] See ¶ 14 of my Dec. dealing with details pertaining to *Cristallina's* holdings and some implications thereof and ¶ 15 of my Dec. re the Christie's/Sotheby's conspiracy.

November 5, 1993 and The Lord Poltimore, head of the relevant Christie's 19th Century Continental pictures department, on March 23, 1994. Neither would agree to offer my painting for sale, even though I had procured a Fuchs' Gutachten (an unqualified opinion that my painting was an authentic work by Schindler).. Maclean insisted that Christie's would not sell my painting with the Fuchs' Gutachten would not cause. I had to get Frödl to reverse his negative opinion on authenticity and provide an unqualified positive painting that my painting was authentic. In response to my letter to Frödl, telling Frödl what Christie's had told me regarding his negative opinion and asking him to withdraw such opinion and issue a positive opinion, Frödl denied in a letter to me, that he had told Christie's that my painting was not authentic and was a fake.[204] I did not learn till March 21, 1994, that Christie's might have been lying to me, when I read the English translation of Frödl's letter. When I confronted Poltimore on March 23, 1994 with what Frödl had said, Poltimore called Frödl a liar and insisted that Frödl had told Christie's that my painting was not authentic and was a fake. Poltimore insisted that I write him, which I did on July 2, 1994. It was a settlement request cum litigation threat, if we did not settle.

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[204] He also reiterated his previous position of 1986 that my painting came from "the hand of Schindler (art speak for an authentic work of art by Schindler), but he could not provide me with a binding opinion on the basis of photographs, but had to see the painting in the flesh. Frödl also stated that he was barred by his museum's policy from providing such opinions in a commercial context, which included me and, obviously Christie's.

In a response letter of July 11, 1994, Maria Ludkin, Christie's counsel, presented a new major "lie:" The reason that Christie's had refused to offer my painting for sale, was because I had refused to make arrangements for the painting to be shipped to Frödl in Vienna, so that he could give a binding opinion on authenticity. I knew that this was a blatant lie, which was totally controverted by 3 of my letters: to Christie's of April 10, 1993, Fuchs of May 1, 1993 and Frödl of January 19, 1994, in which I made clear that I was prepared to have the painting shipped to Vienna or otherwise permit and effectuate Frödl's or Fuchs' inspection of the painting.[205]. In Ludkin's letter, Christie's was, in effect, saying that a Fuchs' Gutachten was not sufficient, Christie's required Frödl's binding positive opinion on authenticity, before Christie's would offer my painting.

.At Poltimore's deposition of March 16, 2000, I obtained two Christie's expert lists. One was a list of

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[205] Thus, I did not know, till I received the July 11, 1994 letter, that Christie's had been engaging in fraud since April 1, 1993, destroying the marketability/value of my painting and requiring me to take unnecessary, burdensome and damaging actions, per the V.C., which was not barred by the Statute of Limitations. The fact that I did not learn or discover until March 21, 1994 that Christie's might have been lying to me and did not confirm this fact until my receipt of the Ludkin July 11, 1994 and that Christie's had been engaged in a continuing fraudulent cover-up of this fact since April 1, 1993 has a dispositive favorable effect on my Statute of Limitations argument, which the court ignored. That I filed the complaint on March 21, 1997 and had prepared an 89 page factual and legal analysis of the Statute of Limitations problem are material considerations regarding the credibility of my assertion that my action against Christie's was not barred by the Statute of Limitations.

c. 1993 and the other was a contemporary (c. March 16, 2000) computer data base version of the list. Most relevantly, materially and importantly, both such lists did not list Dr. Gerbert Frödl as an outside expert that Christie's used regarding Schindler. Rather, both such lists listed and made clear that from c. 1993 to 2000 Christie's expert for Schindler was Dr. Heinrich Fuchs. These lists totally undercut Christie's 1993-1994 lies and made clear that Christie's should have offered my painting for sale, when Christie's learned of the Fuchs' Gutachten and needlessly destroyed the marketability/value of my painting[206] and inflicted other damages. These lists and their implications, as well as Ludkin's major lie being demonstrably so, per my 3 previously written letters, in and of themselves, should have caused the court to deny Christie's Summary Judgment. Motion.

Conclusion: This Court should reverse the court's order denying my motion to extend time for filing a notice of appeal and permit me to do so, or treat one of my two notices of appeal filed on of March 30, and April 13, 2006 as legally sufficient.

Respectfully submitted,

/s/
Robert S. Fastov
Pro Se
4428-45th Street, N.W.

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[206] *See* ¶ 23 of my Declaration, which succinctly explains why Christie's actions destroyed the marketability and value of my Schindler painting.

Washington, D.C. 20016-2053
Tel. No. 202-537-1222

Excerpt From Petitioner's Memorandum In Opposition To The Declaration Of Michael E. Salzman [Respondents' Lead Counsel] In Support Of Christie's Application For Attorn- ey's Fees And Costs Of May 8, 2007

6. Providing Christie's with any attorney's fees under the Court's inherent power or 28 U.S.C. § 1927 will not further the major purposes justifying these powers, which is to deter me from intentionally engaging in conducting litigation unreasonably, vexatious-
ly or in bad faith.

Fernandez v. Leonard, 963 F.2d 459, 463 (1st Cir. 1992 and *Blue v. U.S. Dept. Of Army*, 914 F.2d 525, fn. 3 (4th Cir. 1990) made clear that the overriding purpose of inherent authority and other sanctions powers is to deter abuse of the judicial process.[207] The purpose and justification for imposing sanctions under 28 U.S.C. § 1927, including awards of attorney's fees, is "to deter an attorney from *intentionally* and unnecessarily delaying judicial proceedings, and they are limited to the costs that result from such delay (Court's italics)" *Lasalle Nat. Bank v. First Connecticut Holding*, 287 F.3d 279, 288, 289 (3rd Cir. 2002. *See United States v. Int'l B'hd of Teamsters, Chauffeurs*, 948 F.2d 1338, 1345

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[207] *See R.W. Intern. Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 19 (1st Cir. 1991; *Stafford v. U.S.*, 208 F.3d 1177, 1179 (10th Cir. 2000); *Mann v. Boatright*, 477 F.3d 1140 (10th Cir. 2007); *Christensen v. Ward*, 916 F.2d 1462, 1469 (10th Cir. 1990);" *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 505 (3rd Cir. 1991); *In Re Richards*, 213 F.3d 773, 788 (3rd Cir. 2000).

(2d Cir. 1991; O*vernite Transp. Co., v. Chicago Indus. Tire Co*, 697 F.2d 789, 794 (7th Cir. 1983).[208]

The term "deter" means to "to prevent or discourage from acting." *Beck v. Haik, 377 F.3d 624, 643* (6th Cir. 2004). Thus, deterrence only applies to "future misconduct." *Jung v. Jung*, 844 A.2d 1099, 1107-1108 (D.C. Ct. App. 2004). *Bonds v. District of Columbia,* 93 F.3d 801, 808 (D.C. Cir. 1996) made clear that all deterrent sanctions should not be "overly harsh," "a pointless exaction of retribution," "[t]he choice of sanction should be guided by the "concept of proportionality" between offense and sanction" and "must be calibrated to the gravity of the misconduct."[209].

Courts have also said that the purpose underlying the courts' use of their inherent power is to deter "illegal conduct" (*U.S. v. Horn*, 29 F.3d 754, 759, 760 (1st Cir. 1994)) and "frivolous filings" (*Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 267 (10th Cir. 1995))[210]. With respect to the purpose of deterring "frivolous filings," the Supreme Court has stated that the term "frivolous" includes "claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar." *Neitzke*

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[208] *See also Conner v. Travis County*, 209 F.3d 794, 800 (5th Cir. 2000); *People Of New York v. Operation Rescue Nat.*, 80 F.3d 64, 72 (2nd Cir. 1996); *Zuk v. E. Pa. Psychiatric Inst.*, 103 F.3d 294, 297 (3d Cir. 1996).

[209] *Shepherd v. American Broadcasting Cos., supra*, 62 F.3d at 1477,1479.

[210] *In Re Richards*, 213 F.3d 773, 788 (3rd Cir. 2000); *Doyle v. Oklahoma Bar Assn.*, 998 F.2d 1559, 1571 (10th Cir. 1993) citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Quiroga, supra*, 934 F.2d at 505.

v. Williams, 490 U.S. 319, 327-328 (1989).[211] A claim is legally frivolous when it "lacks an arguable basis either in law or fact." *Neitzke*, 490 U.S. at 325.[212] A federal court may dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. [213] *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983) held: "[T]he mere fact that an [action] is frivolous does not of itself establish bad faith" sufficient to permit a district court to impose sanctions under section 1927." While the Court criticized my Poltimore letter and 2000 actions, they are not "illegal conduct," "frivolous conduct or claim," "bad faith" actions and do not "defile the "temple of justice," as required by the inherent authority test. Moreover, my conduct did not "intentionally," "unreasonably," "vexatiously, "unnecessarily" "multiply" or "unnecessarily delay" the "proceedings," as required by § 1927.

With respect to my Poltimore letter, there is nothing to deter, as such letters, as demonstrated, *supra*, are protected as an exercise of First Amendment rights under the *Noerr-Pennington* doctrine and other principles. There is no need to deter me under the courts' inherent authority or § 1927 regarding my future filings in this matter, as

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[211] *Mitchell v. Horn, 318 F.3d 523, 530* (3rd Cir. 2003); 2007 U.S. App. LEXIS 1648, *Atraqchi v. U.S.*, 06-5316, 2007 U.S. App. LEXIS 1648, (D.C. Cir. January 23, 2007). *See Hilska v. Jones*, 297 F. Supp.2d 82, 87 (D. D.C. 2003). and *Magee v. Hatch*, 26 F. Supp.2d 153, 155 (D.C. 1998).

[212] *Franklin v. Murphy*, 745 F.2d 1221, 1227-1228 (9th Cir. 1984).

[213] *See Brown v. Bargery*, 207 F.3d 863, 866 (6th Cir. 2000); *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999).

all of my filings post Judge Friedman's Order of August 29, 2000 (Docket # 95) striking my motion for leave to file a surreply, have complied with the page limits required by the LCvR or F. R. Civ. P.. Judge Friedman did not sanction me from August 29, 2000 to February 23, 2005 or at any other time, and Judge Stafford did not sanction me for any conduct during his tenure, commencing on February 24, 2005 (Docket # 109), prior to the Court Order.

There are other reasons, detailed in ¶¶ 38 of my Dec., why this Court does not need to deter me under its inherent authority and § 1927 from abusing or delaying legal proceedings based on my age, health, personal interests and desires, the imminent end of this litigation and other lawsuit, in which I have been involved, and my propensities and reasons for not filing other new litigation in the future.

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V. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

A. Constitutional provisions

1st Amendment to the Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (Emphasis added.)."

5th Amendment to the Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation (Emphasis added.). .

B. Statutes

28 U.S.C. § 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 2107. Time for appeal to court of appeals (pertinent provisions)

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree....

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds —

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

C. Regulations

Rule 4, F. R. App. P. (pertinent provisions)

Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered....

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:
(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.
Rule 54, F. R. Civ. P. (B) and (E) insofar as it relates to the deadlines for filing motion's for attorney's fees
(2) Attorney's Fees...
(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:
(i) be filed no later than 14 days after the entry of judgment;
(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.
Rules of the United States District Court for the District of Columbia (LCvR) Rule 7 (e)
(e) PAGE LIMITATIONS.
A memorandum of points and authorities in support of or in opposition to a motion shall not exceed 45 pages and a reply memorandum shall not exceed 25 pages, without prior approval of the court. Documents that fail to comply with this provision shall not be filed by the Clerk.